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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

GARY D. MAYNARD, WARDEN,

Petitioner,

v.

CLIFFORD HENRY BOWEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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September, 1986

QUESTIONS PRESENTED

1. Whether information regarding a discarded suspect (Lee Crowe) may be exculpatory within the meaning of Brady v. Maryland, in the face of uncontested state court findings of historical fact that:

A. The defendant was positively identified at the scene of the triple murders by two eye-witnesses and no other person, including the discarded suspect, was seen at the scene of the crime;

B. That the two witnesses identified the defendant in a photographic lineup containing the discarded suspect and both witnesses stated that the discarded suspect was not the individual whom they had seen on the night of the triple homicide;

C. An in-person lineup was also held and the defendant was positively identified by both witnesses;

D. There was no showing that the discarded witness participated in the offense.

2. Whether the federal court below improperly denied the presumptive correctness of state court findings of fact that no request for exculpatory material had been made by finding state's counsel had "conceded" such a request in the face of statements by counsel that it was the state's position that no such request had been made.

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The Petitioner, Gary D. Maynard, Warden of the Oklahoma State Penitentiary, by and through the Attorney General of the State of Oklahoma, Michael C. Turpen, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this matter.

OPINION BELOW

The decision of the United States Court of Appeals for he Tenth Circuit for which this petition is sought has been

designated for publication but is not yet reported. The style and the court below was Clifford Henry Bowen v. Gary D. Maynard, Tenth Circuit Court of Appeals No. 86-1136. The opinion for which review is sought was rendered on June 25, 1986. The Petitioner warden filed no petition for rehearing in the court below. The text of the Order of the United States District Court for the Western District of Oklahoma which granted Mr. Bowen a Writ of Habeas Corpus is attached as Appendix A and the Opinion of the Tenth Circuit for which review is sought is attached hereto as Appendix B.

JURISDICTION

Jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28 U.S.C. § 2254(d) states:

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit -

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstance respectively set forth in paragraphs numbered

(1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

STATEMENT OF THE CASE

This is an appeal from a judgment of the United States Court of Appeals for the Tenth Circuit affirming the grant of a writ of a habeas corpus to Clifford Henry Bowen. Mr. Bowen was convicted of three counts of capital murder in the District Court of Oklahoma County, Oklahoma. The Oklahoma Court of Criminal Appeals affirmed the conviction. Bowen v. Oklahoma, 715 P.2d 1093 (Okl.Cr.App. 1984). This court denied certiorari. Bowen v. Oklahoma, 105 S.Ct. 3537 (1985). Thereafter, Mr. Bowen sought a Petition for Writ of Habeas Corpus from the United

States District Court for the Western District of Oklahoma. The Honorable Thomas R. Brett granted that writ in an order which attached hereto as Appendix A. Upon the state's appeal, the United States District Court for the Tenth Circuit affirmed in an opinion attached hereto as Appendix B.

STATEMENT OF THE FACTS

For the convenience of the Court, we have divided our presentation of the facts into several segments corresponding with the proceedings had in the courts below.

A. Trial of the Defendant for Murder

References to transcript pages in this section refer to the transcript of Petitioner's trial for murder which was had in the District Court of Oklahoma County, Oklahoma, on March 9-13, 1981. Hereafter, Mr. Bowen shall be referred to as the Defendant.

On July 5, 1980, during the evening hours, a group of guests at the Guest House Inn assembled by the pool. Mary Chilton, a night office clerk at the motel, worked until 10:00 p.m., and then joined her friends at pool side (Tr. 289). Later that evening, she notice a man who was not a guest at the motel (Tr. 292), standing at the concession stand, leaning upon the candy machine (Tr. 311). It was part of her duties to keep intruders off the premises (Tr. 292).

Harold Behrens, co-defendant of the Mr. Bowen and one of the individuals at pool side, placed his hand upon the shoulder of Ray Peters, who is one of the decedents, said "see you tomorrow," and left via the concession area (Tr. 294). Such physical contact upon parting company was not Behrens' normal practice (Tr. 422). Then, Mary Chilton also left by way of the concession area. This area is very well lit by floodlights from the

roofline (Tr. 234, 312), lights on the ceiling of the vending machine area (Tr. 232, 298-99), and light from the vending machines themselves (Tr. 237). All of the above-mentioned lights were on (Tr. 298). Mary Chilton walked within three feet of the man and looked right at him (Tr. 295). She had no trouble seeing the Defendant's face (Tr. 299). In addition, Mary Chilton had a good view of the Defendant when she was sitting at the pool side (Tr. 308). She gave an accurate description of the Defendant's height, weight, and physical stature (Tr. 307). The Defendant had a pale complexion (Tr. 317). This was substantiated by others (Tr. 355). Mary Chilton "memorized" the Defendant's face (Tr. 13), and there was no doubt in her mind that the Defendant was the man that she saw at the concession stand (Tr. 293, 295, 326).

Carrie Pitchford, her husband, and her daughter also were pool side (Tr. 331). The family left the pool area at 1:30 a.m. and went to their room (Tr. 332). While her husband and her daughter went to bed immediately, Carrie did not. She thought about going back out and twice looked out the window to see if any of the women were still by the pool (Tr. 333). She looked out a third time and saw a large, pale complected man, subsequently identified as the Defendant, leaning upon a machine at the concession stand (Tr. 335). The Defendant looked straight up at Carrie Pitchford so that she could see his full face (Tr. 336). She viewed the Defendant for "one full minute or more." (Tr. 354.) The lighting was very good; it was similar to a stage (Tr. 339, 349). Carrie Pitchford had not been drinking that evening (Tr. 343). She had no trouble seeing the Defendant's features (Tr. 339), and

there was no doubt in her mind that the Defendant was the man whom she had seen that evening (Tr. 336). As soon as Carrie laid down, she heard gunfire, jumped up, and saw one of the decedents slump in his pool side chair (Tr. 337).

The manager of the motel noticed an individual in the concession area (Tr. 359). The description of the individual and his attire were substantially the same as the description given by other witnesses. The manager also saw a car with someone sitting in it (Tr. 360). The manager and his wife heard "firecrackers" and then noticed an individual, with a red cap in his hand, shooting a gun (Tr. 361). The manager summoned the police (Tr. 363). As this was being done, a car exited the motel parking lot at a high rate of speed (Tr. 364).

When the police arrived, they found three men sitting at a pool side table, all of whom had at least two gunshot

wounds (Tr. 209). Six .45 caliber spent casings were found, as well as one lead projectile (Tr. 210). At 2:30 a.m., photographs of the scene were taken, and the lighting of the premises, with the assistance of two flashlights, was adequate with which to take photographs (Tr. 220). There were floodlights upon the roofline (Tr. 234), lighting upon the ceiling of the vending machine area (Tr. 232), lighting from the vending machines themselves (Tr.237), and lighting from the motel sign (Tr. 237). The lighting was so good that the photographer stated that "I could load my camera, read my settings, read the tape measure" (Tr. 235).

On July 6, an autopsy was performed upon all three bodies. The death of Ray Peters was caused by two gunshot wounds to the head which resulted in extensive lacerations and a brain hemorrage (Tr. 251). Loose gunpowder was found upon the

body; therefore, the gun was discharged within two feet of the body (Tr. 252). Lawrence Evans had three gunshot wounds inflicted by hollow point bullets (Tr. 256-57). The cause of death was the wounds (Tr. 260). Marvin Nowlin had two gunshot wounds which caused his death (Tr. 268). Pathological symptoms of drug use were found in Peters and Nowlin (Tr. 271). All of the cartridges were fired from the same gun (Tr. 279). Hollow point bullets were used to caused greater damage upon impact (Tr. 283).

In an effort to connect Harold Behrens, a co-defendant, with the Defendant and to provide a motive, the testimony of two additional witnesses was introduced. In 1975, David McBride supervised the organized crime detail of the Oklahoma City Police Department. Harold Behrens, an ex-police officer, was assigned to participate in the surveillance of Jerry Ray James and the

Defendant (Tr. 405). During the later stages of the investigation, Harold Behrens resigned from the police department (Tr. 408). Immediately after the resignation, Jerry James and the Defendant disappeared from Oklahoma City (Tr. 409).

Jack Zumwalt testified that he lived with and was lover of Harold Behrens (Tr. 421). Harold Behrens made his living selling drugs and supported Jack Zumwalt while they lived together (Tr. 421). It was not the custom of Harold Behrens to have physical contact with people upon parting their company, as he had done on the early morning hours of July 6 (Tr. 422). Ray Peters worked for Harold Behrens as a drug dealer (Tr. 423). In June, Ray Peters had been arrested in Pauls Valley, Oklahoma, for driving under the influence and drug charges. Harold Behrens was afraid that Ray Peters would become an informant (Tr. 424). After

Jack Zumwalt heard of Ray Peters' death, he asked Harold Behrens why Ray Peters and not Jim Powell, another drug seller. Harold Behrens replied, "because we need Jim." (Tr. 425.)

An arrest warrant was issued for the Defendant, and Officer Cook went to Tyler, Texas, to serve it (Tr. 432). The Defendant was advised of his rights (Tr. 433). The Defendant was questioned about a number of people, but when he was asked if he knew Harold Behrens, he glanced down and said no (Tr. 436).

The Defendant presented an alibi defense. He presented numerous witnesses who claimed that on the evening in question, the Defendant was at a rodeo in Tyler, Texas. The Defendant took the stand in his own behalf and admitted that he had two prior felony convictions (Tr. 546). He claimed that on July 5, he was not in Oklahoma City (Tr. 549). He claimed that he has made his living since

1971 by gambling and supplemented that income through the purchase and sale of jewelry and real estate (Tr. 548, 522). The Defendant stated that he had psoriasis and was told to get as much sun as possible to remedy the malady, and consequently, that he had a suntan (Tr. 549). The Defendant further alleged that he knew nothing about guns (Tr. 552).

Officer Harrison was called to testify for the defense. The officer stated that Mary Chilton initially identified a photograph of another, namely William Simmons, as the assailant. The officer attempted to secure an arrest warrant for Simmons. Upon cross-examination of Officer Harrison, he revealed that Mary Chilton never made a positive identification of Simmons as the assailant (Tr. 654), and that at an in-person lineup, Mary Chilton said that Simmons looked like the man but definitely was not him.

The State produced rebuttal witnesses. The arresting officer stated that upon arrest the Defendant was light-complected and did not have a tan (Tr. 575-76). This was confirmed by other witnesses (Tr. 580, 583). It was also revealed that there is an airstrip within four minutes of the rodeo where the Defendant allegedly was (Tr. 577), and that a flight from Tyler, Texas, to the Oklahoma City downtown airpark would only take between 30-35 minutes (Tr. 581). Records of in and out flights are not kept, and less than one tank of gas would be required for the round trip. It is only 13 minutes from the Guest House Inn to the downtown airpark (Tr. 584), so that the entire trip would take less than one hour.

Williams Simmons testified. He is only 5'8" and 180 pounds, which is a much smaller frame than the one on the assailant (Tr. 593). To rebut the pre-

sumption raised by the Defendant that he knew nothing about guns, it was revealed that on July 7, 1977, in Plano, Texas, a search warrant was procured for a home in which the Defendant resided along with his wife and another (Tr. 587). The Defendant was arrested and a search uncovered an arsenal of weapons (Tr. 587-88).

The Defendant was found guilty of three counts of Murder in the First Degree. After the second stage of trial, the jury determined that three aggravating circumstances existed and set the punishment for each count at death.

B. Proceedings on Second Motion for New Trial, September 29-30, 1983

On September 29-30, 1983, after an extraordinary remand from the Court of Criminal Appeals, the state trial court, the Honorable Raymond Naifeh presiding,

conducted a hearing which was in part on the issue of the alleged suppression of exculpatory evidence. A transcript of 304 pages was produced by this hearing. At the conclusion of the hearing, Judge Naifeh filed a set of Findings of Fact and Conclusions of Law with the Court of Criminal Appeals. Certain pertinent parts of those Findings of Fact are set out below. In addition, after the Findings of Fact set out below testimony in Judge Naifeh's Court on certain points is set out. Transcript page references in this subsection are to the transcript of the September, 1983, hearings.

FINDINGS OF FACT

1. That no motion for discovery of exculpatory evidence was filed by trial defense counsel on behalf of the Defendant.

2. That no perjured testimony was used to secure the conviction.

3. That the defendant, Clifford Henry Bowen, was positively identified by two (2) eyewitnesses as present at the scene of the crime. No other person, including Lee Crowe, was seen at the scene of the crime.

4. That the two (2) witnesses identified the defendant in a photographic array which consisted of a total of ten (10) photographs (two five-photo spreads).

5. That a photograph of Lee Crowe was in the photographic array and both witnesses stated that Lee Crowe was not the individual whom they had seen on the night of the triple homicide.

6. That an in-person lineup was held and the defendant was positively identified by both witnesses.

7. That the police were aware that Crowe was a suspect but discredited the lead after an intensive investigation which led to the identification of

Clifford Henry Bowen by two (2) eyewitnesses.

8. That while the police were aware that Lee Crowe was in the State of Oklahoma at the time of the triple homicide, there was no showing that he had participated in the offense.

28. That the information regarding Crowe could have been discovered through the exercise of due diligence as the defendant could have requested a list of all suspects prior to trial but failed to do so. (Emphasis added.)

The following testimony was also given in Judge Naifeh's Court. Transcript pages refer to the transcript of the hearing of September, 1983. The Texas Rangers and other police agencies in Texas as well as intelligence units for the Oklahoma City Police Department had reported to Oklahoma City Police that Mr. Bowen was a hit man for the Dixie Mafia. (Tr. 143). One of the Assistant

District Attorneys handling the murder case had received information from the Regional Organized Crime Information Center dealing with Mr. Bowen's reputation for being a hit man, for using a .45, wearing a ball cap, being a residential robber or burgler. (Tr. 247, 250). The scene witness Mary Chilton's attention was specifically directed to Lee Crowe's photograph in the array. (Tr. 157). When Mary Chilton looked at Bowen's photograph she began to tremble. (Tr. 175). Mrs. Chilton was asked again if there was any possible way that Lee Crowe's photograph could be of the shooter. (Tr. 292). The police usually asked witnesses looking at photographs to look at the person, not the hair, or mustaches, because these things could be changed. (Tr. 291). The officer testifying in Judge Naifeh's Court did not recall the exact words on such questions with Mary Chilton. (Tr. 292).

Counsel for Mr. Bowen was aware as early as September, 1983, that some authorities in South Carolina considered Lee Crowe to be a hit man as indicated by cross-examination in Judge Naifeh's Court. (Tr. 275-76).

Lee Crowe's alibi for the night of the murders was not confirmed until 1983 when police officers went to the Mansville, Oklahoma area to talk with C. B. Forguson at whose home Crowe and Patsy Peters were staying. (Tr. 293, 296).

C. FINDINGS OF OKLAHOMA COURT OF CRIMINAL APPEALS

In its review of the case, after receiving Judge Naifeh's Findings of Fact and Conclusions of Law, the Oklahoma Court of Criminal Appeals also found that Mr. Bowen had made no request for exculpatory evidence prior to trial. In doing so, the Court of Criminal Appeals used the following language:

> Appellant asserts the suppression of the allegedly

> exculpatory evidence regarding these suspects denied him due process of law under the authority of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). However, as appellant recognizes, no request was made for exculpatory evidence prior to trial (emphasis added).

Bowen v. State, 715 P.2d 1093, 1098 (Okla. Crim. App. 1984). In the same vein, the Court of Criminal Appeals went on to state:

> The district court made a thorough and exhaustive order in this matter. It found that the information regarding Crowe could have been discovered through the exercise of due diligence by requesting a list of suspects prior to trial, but the defense failed to do so. Also, the district court noted that the appellant failed to show under what theory of evidence law that the rumors, suspicions and innuendos concerning Crowe would have been admissible in the trial of the case. Further, the district court correctly found that the mere possibility that an item of undisclosed information might have helped the defense or might have affected the outcome of the trial, does not establish materiality. 22 O.S. 1981, § 1952 (Seventh) (Emphasis added).

Id. 715 P.2d at 1103.

D. PROCEEDINGS IN FEDERAL DISTRICT COURT

The United States District Judge who originally granted Mr. Bowen the writ, the Honorable Thomas R. Brett, acknowledged that Judge Naifeh made a specific finding that there was no request for exculpatory evidence using the following language and a colloquy with the undersigned counsel:

> THE COURT: He made a specific finding there was no such request, and when you gentlemen conceded before me there was such an oral request, that kind of lays that matter to rest, at least insofar as that being a fact.
>
> . . .
>
> MR. NANCE: Thank you, Your Honor. I have not seen a transcript of our previous hearing. I don't recall saying that but if -- and I certainly didn't intend to say it if I did, but I'll not argue with you on that because I think that would be fruitless at this point (Emphasis added).

Transcript, p. 15-16 of proceedings on hearing on Motion to Stay, January 23, 1986.

E. PROCEEDINGS IN THE COURT BELOW

However, in light of these findings, Court of Appeals below stated that it was unclear whether either the State trial court or the Court of Criminal Appeals implicitly decided that no informal, oral request had been made. Slip op. at 28, Bowen v. Maynard, No. 86-1136, slip op. at 28 (10th Cir. June 25, 1986). The Court of Appeals did state that if either State court did find no request of any kind had been made, that finding would be one of historical fact and entitled to the presumption of correctness under 28 U.S.C. § 2254(d). Id., slip op. at 28.

Both federal courts below dealt with the statutory presumption of correctness by finding that counsel for

the state had conceded a pretrial request for other suspects. Bowen v. Maynard, No. 86-1136, slip op. at 30-36 (10th Cir. June 25, 1986). The courts below found this concession over our repeated objections, our continued and repeated reliance upon Judge Naifeh's Findings of Fact, our argument that the federal court should take no more testimony on the question of exculpatory evidence, and the following colloquy with the United States District Court during the closing arguments:

> MR. NANCE: I kept trying to argue that it was irrelevant to whether or not defense could have used that for some purpose, the Crowe material. They probably could. But that's not the constitutional standard that we have to give anything they might use, they might find useful or interesting to know.
>
> THE COURT: Well, that's certainly true if there is no request made. Right?
>
> MR. NANCE: Yes, sir, it is. Even if there is a request made, I think the fact that it

> might be helpful doesn't matter either. You could request everything in there, piece by piece, point by point, that might conceivably be helpful and I don't think there would be any duty to disclose the bulk of that kind of thing.
>
> It is obviously of substantial value to the defense? The example, I think from Footnote 18, [of U.S. v. Agurs, 427 U.S. 97 (1976)] without a specific request, his fingerprints that say your man didn't do it. That kind of thing. Our view is and continues to be at this point that there was no request. And we'll brief the question we discussed earlier.

Transcript 50-51, Closing Statements, October 17, 1985. (Emphasis added). Despite recognizing this exact language, the Court of Appeals went on to find that the State had conceded that there had been a pretrial request for exculpatory evidence. Bowen v. Maynard, No. 86-1136, slip op. at 31 (10th Cir. June 25, 1986).

REASONS FOR GRANTING THE WRIT

PROPOSITION I

THE FEDERAL COURTS BELOW IGNORED UNCHALLENGED STATE FINDINGS OF HISTORICAL FACT TO REACH THEIR DESIRED RESULT AND CONCLUDE THE LEE CROWE MATERIAL WAS EXCULPATORY.

A. STATE COURT FINDINGS OF FACT

As shown above, the original state court trial judge, the Honorable Raymond Naifeh, on extraordinary remand from the Oklahoma Court of Criminal Appeals conducted an evidentiary hearing and made certain findings of fact and conclusions of law. These findings of fact include findings that Clifford Henry Bowen was positively identified by two eye-witnesses as present at the scene of the crime and that no other person, including Lee Crowe, was seen at the scene of the crime. (Finding 3). Judge Naifeh further found that the two witnesses identified Clifford Henry Bowen

from a photographic array which included Lee Crowe and that both witnesses stated that Lee Crowe was not the individual whom they had seen on the night of the triple homicide. (Findings 4 and 5). Judge Naifeh further found that both witnesses positively identified Clifford Henry Bowen at an in person lineup. (Finding 6). Judge Naifeh further found that the police were aware that Crowe was a suspect but discredited the lead after an intensive investigation lead to the identification of Clifford Henry Bowen by the two eye-witnesses. (Finding 7). Judge Naifeh found that the police were aware that Lee Crowe was in the State of Oklahoma at the time of the triple homicide, but that there was no showing that he participated in the offense. (Finding 8).

Importantly, the two women who identified Clifford Henry Bowen from the photographic array did so independently,

one in Oklahoma and the other in California. Neither woman had a motive to lie and the preceptions and recollections of both were subject to cross-examination at trial. These findings of basic historical fact were unchallenged by Mr. Bowen and ignored by the federal courts below. Taken together, these findings of historical fact, entitled to a presumption of correctness pursuant to 28 U.S.C. § 2254(d), compell the conclusion that Clifford Henry Bowen, not Lee Crowe, was present in Oklahoma City at the scene of the triple murders and committed those murders. No one, even to this date, has placed Lee Crowe any closer to the scene of the crimes than the Madill, Oklahoma area, approximately 130 miles away. Only by ignoring these inconvenient findings of facts could the federal courts below come to the conclusion they desired.

B. THE LEE CROWE INFORMATION IS NOT EXCULPATORY.

The error of the court below, devastating to the administration of criminal justice in the Tenth Circuit, was to focus on the usefulness of the Lee Crowe material at trial instead of focusing on its affect on the truth and justice of the finding of Clifford Henry Bowen's guilt. This Court has stated that the three elements of a violation of Brady v. Maryland, 373 U.S. 83, 87 (1963), are the suppression by the prosecution after the request by the defense, the character of the evidence for the defense, and the materiality of the evidence. Moore v. Illinois, 408 U.S. 786, 794-95 (1972). The court below paid only lip service to the clear pronouncements of this court that, in considering exculpatory evidence, our overriding concern is with the justice of the finding of guilt. United States v.

Bagley, 473 U.S. ___, 87 L.Ed.2d 481, 491 (1985); United States v. Agurs, 427 U.S. 97, 112 (1976). Indeed, the court below adopted a theory expressly rejected by this Court in Agurs. In Agurs, the court rejected as unacceptable for determining the materality of Brady material the standard of the impact of the undisclosed evidence on the defendants ability to prepare for trial, rather than materality of the evidence to the issue of guilt or innocence. Agurs, supra, 427 U.S. at 112 n. 20. As discussed below, the Court over our objections, relied precisely upon the standard rejected by this court in Agurs to decide the present case.

A proper resolution of the issues in this case may be found by relying upon Moore v. Illinois, 408 U.S. 786 (1972). In that case, this Court dealt with a Brady question in which one witness, Sanders, had informed police that a man known to him as "Slick" had told him that

he had recently shot a bartender in Lansing, Illinois, the scene of the murder in question. Id. 408 U.S. at 789. Moore, and not "Slick", was the defendant charged with the murder. Moore raised an alibi defense that he was working as a waiter in a country club in another city at the time of the shooting. Id. 408 U.S. at 790. Records at the country club indicated that the defendant had been paid for working that night and defense witnesses testified that they would have known if he had been absent for any substantial period of time. Id. 408 U.S. at 791. Records of the club also indicated that the defendant had been working at the country club at the same time prosecution witnesses testified he was elsewhere making inculpatory statements. Id. 408 U.S. at 791. The police attempted without success to locate the suspect "Slick." Id. 408 U.S. at 793. Further, the witness Sanders who

had identified "Slick" told police officers that "Slick" was thirty to forty pounds heavier than defendant Moore and did not wear eyeglasses. Id. 408 U.S. at 793. Moore argued that the failure of the prosecution to inform him of Sanders identification of "Slick" as the man making the statement regarding shooting a bartender was exculpatory within the meaning of Brady, supra.

In ruling against Moore's claim of exculpatory evidence, this Court stated:

> We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case. Here, the elusive "Slick" was an early lead the police abandoned when eyewitnesses to the killing and witnesses to Moore's presence at the Ponderosa were found.

Id. 408 U.S. at 795. In that case the Court went on to state:

> None of the five items serves to impeach in any way the positive identification by Hill and by

> Powell of Moore as Zitek's killer, or the testimony of Fair and Joyce that Moore was at the Ponderosa Tap on April 27, or the testimony of Fair that the moustached Barbee was accompanying Moore at that time, and that one of the two men made the additional and undisputed admission on the ride to Harvey. We conclude, in the light of all the evidence, that Sanders' misidentification of Moore as Slick was not material to the issue of guilt.

Id. 408 U.S. at 796-97. Because the two scene witnesses who had identified Clifford Henry Bowen as being the man at the scene of the triple murders had rejected Lee Crowe in a photo lineup and had positively identified Bowen at an in-person lineup, we believe the opinion of the court below amounts to an explicit rejection of this Court's teaching in Moore v. Illinois, supra. The result of the ruling below will require prosecutors to reveal information on rejected suspects even when it clearly appears, as found by Judge Naifeh herein, that those suspects were not involved in the crimes.

That result will in turn create a premium on the ability of defense counsel to mislead juries, even after the fact, rather than on the proper emphasis on the guilt or innocence of an accused.

The court below expressly recognized this court's admonition that the inquiry is grounded in an overriding concerning with the justice of the finding of guilt. Bowen v. Maynard, No. 86-1136, sl. op. at 44 (10th Cir. June 25, 1986). However, the court below did not even bother to argue away Judge Naifeh's unchallenged findings of historical fact that Clifford Henry Bowen, and only Clifford Henry Bowen, was positively identified at the scene of the murders. It simply ignored those findings or, at most, considered them as argument presented by the state rather than presumptively correct findings of fact of a state court. Then, the Court went onto hypothesize the motives of Lee Crowe to murder the

victims. Id. slip op. at 45. The court below went so far as to state that Lee Crowe had "a distinct opportunity to commit the murders" when all the evidence, and the only evidence, as well as Judge Naifeh's findings of fact, indicate that Clifford Henry Bowen, not Lee Crowe, was present at the scene of the murders. Id., slip op. at 46. If Lee Crowe had "a distinct opportunity to commit the murders" that opportunity occurred from a range of 130 miles from the scene of the crimes, because no one, to this date, has placed him any closer to the murders than that distance. The court below further found that Lee Crowe had the ability to commit the murders. Id. slip op. at 47. Next the court criticized the investigation leading to Mr. Bowen's arrest and stated how, with the Lee Crowe material, "a defense lawyer of less than heroic skill" could have

theorized why the state charged Bowen rather than Crowe. Id. slip op. at 47-48.

All this was done by ignoring unchallenged and presumptively correct findings of fact by the state court which would render the court below's imaginative treatment of Lee Crowe impossible. Because Judge Naifeh found that the witnesses positively identified Clifford Henry Bowen, rather than Lee Crowe, on the scene of the murder and that Lee Crowe was not present there, the treatment of Lee Crowe by the Tenth Circuit becomes speculation of the worst sort, in flat disregard of the congressional mandate of 28 U.S.C. §2254(d).

The court below erred, and erred seriously, when it ignored Judge Naifeh's inconvenient findings of fact and affirmed the writ by finding a duty to disclose, even without a request, information regarding a discarded

suspect, because the defense could find that information useful at trial where the information does nothing to cast doubt on the justice of the finding of guilt of Clifford Henry Bowen. The effect of that error is to require disclosure of discarded suspects by prosecutors in the Tenth Circuit whenever that information could supposedly be used to impeach anyone, regardless of whether or not that information is favorable to the defense on the issue of guilt or punishment. This result departs seriously from this court's pronouncements on what is material exculpatory evidence and renders criminal convictions in the Tenth Circuit infirm for reasons having nothing to do with the justice of findings of guilt or the appropriateness of punishment in those states of the Tenth Circuit. We respectfully urge the Court to grant the writ and reverse the judgment below.

PROPOSITION II

EVEN ASSUMING THE LEE CROWE MATERIAL WAS EXCULPATORY IN THE LEAST, THE COURTS BELOW GAVE INADEQUATE DEFERENCE TO STATE COURT FINDINGS OF FACT THAT THERE HAVE BEEN NO REQUEST FOR INFORMATION ON OTHER SUSPECTS.

A. TREATMENT OF STATE COURT FINDINGS OF FACT

The original state trial judge, the Honorable Raymond Naifeh, after special hearing, found that the information regarding Lee Crowe could have been discovered through the exercise of due diligence as the defendant could have requested a list of all suspects prior to trial but failed to do so. (Naifeh Finding 28). The Oklahoma Court of Criminal Appeals found that no request was made for exculpatory evidence prior to trial. Bowen v. State, 715 P.2d 1093, 1098 (Okla.Crim.App.1984). In discussing Judge Naifeh's findings, the Court of Criminal Appeals affirmed that the state

trial court found that information regarding Crowe could have been discovered through the exercise of due diligence by requesting a list of suspects prior to trial, but the defense failed to do so. Id. 715 P.2d at 1103. In the same passage, the Oklahoma Court of Criminal Appeals stated that Mr. Bowen had failed to show under what theory of evidence the Lee Crowe material would have been admissible and that the mere possibility of an item of undisclosed information might have helped the defense or affected the outcome of the trial does not establish materiality. Id. 715 P.2d at 1103.

The federal trial judge, the Honorable Thomas R. Brett, understood that Judge Naifeh had made a specific finding that there was no oral request. (Transcript p. 15, proceedings on hearing on Motion to Stay, January 23, 1986). However, Judge Brett went on to conclude

that the state had conceded there had been such a request. Id. p. 15. This conclusion was incorrect and has been vigorously contested since that time. First, in closing arguments before the federal district court had ruled, undersigned counsel stated that our view was and continued to be that there had been no such request. (Transcript 50-51 of hearing of October 17, 1985). The first proposition in our Proposed Findings of Fact and Conclusions of Law in the federal district court, running three pages, was that Judge Naifeh's Findings of Fact were presumed correct under 28 U.S.C. § 2254(d). Our third proposition in those Findings of Fact and Conclusions of Law, dealing with the Brady question, began as follows:

> During the evidentiary hearing on Petitioner's second motion for new trial in the state court the Honorable Raymond Naifeh prepared Findings of Fact and Conclusions of Law.

> Because the Petitioner has failed to meet the requirements of 28 U.S.C. § 2254(d), this Court adopts Judge Naifeh's findings of fact and presumes them correct. Judge Naifeh's finding No. 38, with subparts A through S may be found at pages 6 and 7 of his Findings of Fact and Conclusions of Law which are attached hereto and adopted with regard to the findings of fact.

Respondent's Proposed Findings of Fact and Conclusions of Law, November 25, 1985, at 31. Two pages later in those Proposed Findings of Fact and Conclusions of Law, we rather inartfully dealt with the alleged oral request arguing that it was legally inadequate out of a fear that Judge Brett might find Judge Naifeh's Findings of Fact were not adequately supported by the record. 28 U.S.C. § 2254(d)(8). It was this latter language which the court below siezed upon to support its conclusion that we had conceded the existence of an oral question. This was done by ignoring our

repeated invocation of Judge Naifeh's findings and in spite of the fact that Judge Brett essentially took no testimony not also given before Judge Naifeh. Despite the clear language of Judge Naifeh's Findings of Fact, the opinion of the Oklahoma Court of Criminal Appeals, and federal Judge Brett's recognition that Judge Naifeh had found no oral request, the court below stated that it was unclear whether either the state trial court or the Court of Criminal Appeals implicitly decided that no informal oral request had been made. Bowen v. Maynard, No. 86-1136 slip op. at 28 (10th Cir., June 25, 1986). The court below did recognize that if either state court did find that no request had been made this would be a finding of historical fact entitled to a presumption of correctness by federal courts under 28 U.S.C. § 2254(d). Id. slip op. at 28. The court below concluded that the state had

conceded an oral request regarding suspects even in spite of its recognition that undersigned counsel had contradicted this "concession" in closing argument by stating that "our view is and continues to be at this point that there was no request." Id. at 31. The court below bolstered this conclusion by overlooking our reliance on Judge Naifeh's findings in our lower federal court Findings of Fact and Conclusion of Law two pages before our inartful discussion of the alleged oral request, discussed above. See Id. at 31-32. Finally and surprisingly, the court below found that the "concession" constituted the state's "admission" that the state court determination was erroneous to the extent that it could be interpreted to mean that no oral request was made. Id. at 38.

B. EFFECT OF THE ERROR BELOW

Thus, the court below concluded that the state had "admitted" that Judge

Naifeh's Findings of Fact were erroneous even while we repeatedly and insistently relied on those same Findings of Fact as correct to support our position. This unsupportable conclusion regarding the alleged concession was required because Mr. Bowen made no attempt to deal with the requirements of Sumner v. Mata, 449 U.S. 539 (1981), while we had consistently argued the correctness of the state court Findings of Fact. See Bowen v. Maynard, No. 86-1136 slip op. at 26 (10th Cir., June 25, 1986). Ironically, we relied in the federal district court on the requirements of 28 U.S.C. § 2254(d) and Sumner v. Mata, 449 U.S. at 550, requiring a habeas corpus court to find one of the seven specific statutory reasons or that state court Findings of Fact were not supported in the record before rejecting those findings. Rather than finding one of those reasons, the federal trial court

found that we had conceded as incorrect one of the facts found in the state court findings upon which we relied. The federal district court did not include in its opinion its reason to conclude that any of the statutory factors from § 2254(d) was present as required by Sumner. Id. 449 U.S. at 551. The Tenth Circuit justified this failure to follow the requirements of Sumner and of the habeas corpus statute by converting our position into a "concession" that the state court findings we had always advanced a right were in fact wrong.

We expect the district court and the court below would not have gone to such trouble to misconstrue our position had those courts been completely secure in their conclusion that the Lee Crowe material was so exculpatory it created a reasonable doubt that did not otherwise exist and therefore should have been disclosed even without a request. Bowen

v. Maynard, No. 86-1136, slip op. at 49 (10th Cir., June 25, 1986). It is hard to compare the Lee Crowe material, especially in light of Judge Naifeh's findings, with the prototype of evidence that is of such substantial value to the defense that elementary fairness requires its disclosure even without specific requests as set out in Agurs, that is, fingerprint evidence demonstrating that the defendant could not have fired the fatal shot. United States v. Agurs, 427 U.S. at 110 n. 18. The Lee Crowe material simply fails to meet that high standard of materiality because in no way does it indicate that Clifford Henry Bowen did not commit the three murders for which he was convicted.

Therefore, the federal courts below were required to go to great lengths to create circumstances under which the higher Agurs standard for a specific request applied. That standard

of materiality, of course, is that the supressed evidence "might have affected the outcome of the trial." Agurs, 427 U.S. at 104.

The court below could understandably feel more comfortable with the conclusion that the Lee Crowe material might have affected the outcome of the trial based upon its apparent understanding of Brady that exculpatory evidence is evidence which could be helpful to the defense. Certainly the Lee Crowe material could have been helpful to the defense at trial. However, as shown above, the Lee Crowe material does nothing to detract from the guilt of Clifford Henry Bowen. Thus, it appears that the Tenth Circuit struggled mightily to convert our position into a "concession" in order to meet the higher Agurs standard of materiality and justify freeing Mr. Bowen while virtually convicting Lee Crowe in abstentia. We

respectfully suggest that this court should grant certiorari to review the proceedings in this case and to exercise this Court's jurisdiction to correct the profound errors in the opinion below which will only serve to further cripple law enforcement in the Tenth Circuit.

CONCLUSION

The federal courts below have released a convicted triple murderer, by making two separate and serious errors respecting state court findings of fact presumed correct under 28 U.S.C. § 2254(d) and by making an even more serious error in their reading of Brady and its progeny.

First, the courts below ignored uncontested findings of fact indicating that the Defendant, Clifford Henry Bowen, and not Lee Crowe, the discarded suspect, was the only man positively identified at the murder scene. There was no showing

even today, that Lee Crowe was even in the same city at the time of the murders or participated therein.

Next, because Mr. Bowen failed to address the requirements of Sumner v. Mata, the federal courts converted our constant reliance on state court findings of fact into an "admission" those findings were wrong and that Mr. Bowen's counsel had made an oral request for exculpatory information. The alleged "concession" of counsel results in granting relief on virtually the same evidence in the record when this Court denied Mr. Bowen's request for certiorari after direct appeal. Discarding these state findings of fact only increases impermissably the friction between the state and federal courts which Congress sought to reduce with 28 U.S.C. § 2254(d).

Finally, the federal courts below

with the justice of the finding of guilt into a license to set aside fairly won convictions because information about a discarded suspect might have helped the defense, even though it in no way indicates the defendant is not guilty. Countless convictions in the Tenth Circuit are now subject to Brady attack even though no evidence material to guilt or punishment may have been withheld. This Court's opinion in Moore v. Illinois has been effectively overruled in the Tenth Circuit and only complete disclosure can satisfy the standard adopted by the Tenth Circuit.

In order to restore the proper balance between state and federal courts under 28 U.S.C. § 2254(d) and to return the Brady doctrine to its rightful and beneficial place in the Tenth Circuit, we respectfully ask this Court to grant the

writ of certiorari and reverse the judgment of the court below.

Respectfully submitted,

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86-485

Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

GARY D. MAYNARD, WARDEN,

Petitioner,

v.

CLIFFORD HENRY BOWEN,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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September, 1986

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 86-1136

CLIFFORD HENRY BOWEN,

Petitioner-Appellee,

v.

GARY D. MAYNARD, Warden,
Oklahoma State Penitentiary,

Respondent-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. CIV-85-1868-BT)

Before HOLLOWAY, Chief Judge, LOGAN, and SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

Clifford Henry Bowen has been incarcerated in the Oklahoma State Penitentiary under three death sentences for over five years. Convicted of a triple murder, Bowen maintains his innocence and argues that the State of Oklahoma

violated his federal constitutional rights when it failed to disclose to the defense certain material concerning an early suspect in the case. Having considered the withheld material, we hold that it casts such grave doubt on the convictions that they cannot be permitted to stand. The prosecution had a federal constitutional duty to reveal the material either with or without a specific request by the defense. We therefore affirm the district court's ruling that the convictions are constitutionally infirm.

I.

BACKGROUND

A. Procedural History

Bowen was arrested on August 28, 1980 and pled not guilty to an information charging him and Harold Behrens with three counts of first degree murder in violation of Okla. Stat. Ann. tit. 21, §

701.7 (West 1983). Behrens was convicted first in a separate trial and sentenced to life imprisonment. His conviction was affirmed by the Oklahoma Court of Criminal Appeals. See Behrens v. Oklahoma, 699 P.2d 156 (Okla. Crim. App. 1985).

The case against Bowen was tried to a jury before Oklahoma County District Judge Raymond Naifeh. The jury returned three guilty verdicts and recommended death sentences on each count. Bowen filed a motion for new trial and then an amendment to that motion, alleging ineffective assistance of counsel. Judge Naifeh overruled the motion and signed the death warrants.

While his appeal was pending before the Oklahoma Court of Criminal Appeals, Bowen filed in that court a second motion for new trial alleging newly-discovered evidence and the failure to disclose

exculpatory material. The Court of Criminal Appeals remanded the matter to the trial court to determine if an evidentiary hearing was appropriate. Judge Naifeh conducted hearings and filed findings of fact and conclusions of law overruling the second motion. The Court of Criminal Appeals affirmed Bowen's convictions. See Bowen v. Oklahoma, 715 P.2d 1093 (Okla. Crim. App. 1984). The United States Supreme Court denied certiorari, see Bowen v. Oklahoma, 105 S. Ct. 3537 (1985), and the Court of Criminal Appeals set Bowen's execution for August 12, 1985.

Bowen filed a petition for a writ of habeas corpus and an application for stay of execution in the United States District Court for the Western District of Oklahoma. He alleged denial of due process by the prosecution's withholding of exculpatory evidence and denial of

effective assistance of counsel. United States District Judge Thomas R. Brett granted the stay and held an evidentiary hearing intended to supplement evidence taken in the state proceeding.

The federal district court filed an opinion and findings of fact and conclusions of law. The court set aside Bowen's convictions and issued the writ of habeas corpus, although it held that the State may re-try Bowen for the triple murder. The court based its decision on the withheld evidence and declined to reach the claim of ineffective assistance of counsel. The court thereafter denied the State's motion to stay Bowen's release pending appeal. The court provided several conditions for his release, including that Bowen be required to post a $100,000 appearance bond. The court stayed the effect of its decision pending disposition of a stay motion in

this court. This panel heard oral argument on the State's motion to stay and denied the motion but stayed the effect of our order for seven days. Justice White stayed the writ of habeas corpus pending appeal before this court.

On the merits of its appeal, the State contends that (1) the federal district court erred in finding that the defense made a specific oral request for a list of other suspects, and (2) the withheld material is not exculpatory within the meaning of Brady v. Maryland, 373 U.S. 83 (1963), and its progeny.

B. The Guest House Murders

A notorious triple murder occurred in Oklahoma City on July 6, 1980 at approximately 2:00 a.m. Ray Peters, Lawrence Evans, and Marvin Nowlin were fatally shot as they sat around a poolside table at the Guest House Inn motel. Although the murder weapon was

not found, bullets and shell casings recovered at the scene revealed that a .45 caliber automatic weapon with silver-tipped, hollow point bullets had been used. Several witnesses related that an unfamiliar man had been seen in the pool concession area before the shooting and that, after gunshots were heard, he ran and fled in a waiting vehicle.

Other information pointed in the direction of Harold Dean Behrens. Formerly a detective with the Oklahoma City Police Department, Behrens made his living selling drugs at the time of the crime. Ray Peters, alleged by the State to be the primary victim, worked for Behrens as a drug dealer. The month before his death, Peters had been arrested in Pauls Valley, Oklahoma on drunk driving and drug charges. Behrens had gotten Peters out of jail and was allegedly concerned about the excessive

use of whiskey and Dilaudid by Peters, the loss of profits due to Peters' consumption of the goods, and the possibility that Peters would inform on him to the authorities. A short time before the shooting, Behrens and his lover Herman Borden had been sitting at the poolside table with Peters and various other people including the identification witnesses. Upon leaving the table and in full view of the stranger lurking in the concession area, Behrens put his hand on Peters' shoulder and said he would see him tomorrow. Jack Zumwalt, Behrens' former lover, testified at trial that it was not Behrens' custom to make physical contact with people upon parting company. The State argued that Behrens' gesture "fingered" Peters for the hit man.

Based on descriptions of the man seen in the pool area before the shooting,

provided primarily by Mary Lee Chilton and Carrie Pitchford, a police flyer was circulated containing a composite sketch and bearing the following caption:

> SUSPECT WANTED FOR THE TRIPLE HOMICIDE OCCURRING AT THE GUEST HOUSE MOTEL AT 5200 N. CLASSEN AT 2:00 A.M. ON 7/06/80.
>
> SUSPECT: WM/50, 6'1", 210-250#, POT BELLIED, SALT AND PEPPER HAIR BEING MEDIUM LENGTH, WEARING A RED BASEBALL CAP, LONG SLEEVED BLUE SHIRT, FADED BLUE JEANS, BROWN WORK BOOTS LACED UP, HAVING A WEEK'S GROWTH BEARD.
>
> WEAPON USED: .45 CAL COLT AUTOMATIC
>
> AMMUNITION: WINCHESTER-WESTERN HOLLOW POINTS
>
> IF SUSPECT IS LOCATED, PLACE IN JAIL ON ABOVE CHARGE AND CONTACT DET. BOB HORN IN HOMICIDE DETAIL.

Def. trial ex. 1.

Upon hearing the description of the alleged assailant and the connection with Behrens, Detective Sergeant David McBride of the Oklahoma City Police Department thought of Clifford Henry Bowen. In 1975, McBride had headed the department's

organized crime detail. Behrens was a detective under his supervision and brought information to the detail regarding a man named Jerry Ray James. Bowen was seen with James and became an object of surveillance. Toward the latter stages of the investigation, Behrens left the police department; shortly thereafter, James and Bowen were no longer seen in Oklahoma City. No charges against James or Bowen arose out of the investigation, although at trial the State relied on the investigation to buttress its theory that Behrens had retained Bowen as a professional hit man.

McBride recalled this investigation five years past and found the description of the suspect reminiscent of Bowen: "The salt and pepper hair. The big jaws, the pot belly. The horn-rimmed glasses. Several things that sounded exactly like him as I remembered him." rec., vol. V,

trial trans., vol. II, at 386-87 (emphasis added). McBride pulled a picture of Bowen from police records and brought the information to homicide detectives, who presented the picture to Chilton and Pitchford in a photo array consisting of two groups of five photos each. Group No. 1 featured Bowen without his customary horn-rimmed eyeglasses. None of the men in the first group had mustaches. In Group No. 2, three of the five men, including the suspect Lee Crowe, see infra Part I(D), had mustaches. Both witnesses identified Bowen in the array and subsequently in a live lineup, although it is disputed whether Chilton also had positively identified a man named William Wayne Simmons from a photo array, and a police detective in a lineup. Chilton underwent hypnosis in an attempt to sharpen her memory of the events, but the fact that

she had been hypnotized was never presented to the jury, see rec., vol. III, trial trans., vol. I, at 287-327, and it first appears in the record in the first motion for new trial, see id. vol. III, trial. trans., vol. III, at 913-15.

Following the identification of Bowen by Chilton and Pitchford, police obtained an arrest warrant on August 27. That same day an information was filed charging Harold Dean Behrens and John Doe with the murders. On August 29, Bowen was interrogated by Oklahoma City detectives with counsel present and was taken into custody. Bowen's name was substituted for John Doe on the information.

C. The Trial

The case against Bowen rested upon the testimony of the two witnesses who had seen the man in the pool area. No

fingerprint, ballistic, or other physical evidence tied him to the crime.

Mary Chilton worked at the Guest House as night office clerk. She testified that sometime after 12:15 a.m. she first observed a man standing in the pool concession area whom she did not recognize as a registered guest. He was at least six feet tall, weighed 200 to 250 pounds, and had salt and pepper hair, a medium-sized beer belly, and a slight growth of beard. He wore a red baseball cap, medium blue long-sleeved work shirt, blue jeans, and work boots. He was not wearing eyeglasses. His forehead was covered with the cap. The single most outstanding characteristic was that his face was pale, "a whitish gray color like he had not been out in the sun." Rec., vol. III, trial trans., vol. I, at 317. She had observed the man at various moments between midnight and 2:00 a.m.

and had walked within three feet of him in a well-lighted area.

Carrie Pitchford, a motel guest, testified that she had been sitting at the poolside table with Peters, Nowlin, Behrens, and others for much of the day and that she returned to her room between 1:15 and 1:30 a.m. She looked out the window, over a distance of eighty-five feet, and saw a "very large man" who was at least six feet tall and wore no glasses. Rec., vol. V, trial trans., vol. II, at 334, 356. His face appeared "very large" and "[v]ery, very white." Id. at 355. He wore a white T-shirt, jeans, and a bright red cap. His light-colored hair stuck out from under the cap, but she did not see any facial hair. The man had looked straight up at her, and she looked at him full in the face. The lighting "was similar to the stage in a grammar school . . . . The lighting was

very good." Id. at 339; see also id. at 349. When she identified Bowen in court, Pitchford described him as he sat at counsel table as wearing glasses, and having gray hair and "a very light skin." Id. at 334-35.

Several other witnesses were presented to the jury in the State's case in chief. The manager of the Guest House, Promud Govind, testified that sometime after midnight he saw a man wearing a red ball cap standing in the concession area. When he heard gunshots, he saw from the motel office, 100 to 150 feet away, a man wearing a red cap with his hand raised and shooting.

Jack Zumwalt testified to his close business and personal relation with Behrens. He also related that the day after the murders he called Behrens, told him he had read about the killings in the newspaper, and asked him about it.

Behrens said he did not have anything to do with it, although he had been there with Herman Borden. Behrens further stated that they had walked by the alleged assailant and that they too could have been shot. Several days later Zumwalt asked Behrens why it was Ray Peters and not Jim Powell, another drug dealer working for Behrens. Behrens replied that "it was because he needed Jim." Id. at 425. On cross examination Zumwalt acknowledged that he had never heard Behrens mention Bowen.[1]

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[1]Behrens did not testify at trial and has never testified in these proceedings except in an offer of proof at the first motion for new trial. At that hearing, Behrens stated that he did not know Bowen and had never seen him before that proceeding. He further testified that prosecutors had offered him a 10-year sentence in the federal penitentiary for his own three murder charges in exchange for his testimony that he knew Bowen. Behrens related his response to the offer: "I would gladly testify but I

Alibi was Bowen's defense. He produced a parade of twelve witnesses who stated that Bowen had been at a rodeo in Tyler, Texas, some 300 miles from Oklahoma City, until approximately midnight on July 5. Bowen's wife and stepdaughter testified, as did four members of the Wheeler family, who owned the rodeo, and six other witnesses unrelated to Bowen or to the Wheelers. Dennis Wayne Blan, a bull rider, stated that he first met Bowen a month before July 5 and that he had ridden Hook'em Henry, a bull named for Bowen, in the July 5 rodeo. Dennis' mother, Jerry, first met Bowen at the July 5 rodeo. Dennis' stepfather, Jerry, first met Bowen at the July 5 redeo. Dennis' stepfather, David, had previously

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don't know the dude, you know. I would have testified but I don't know Clifton Bowen." rec., vol. III, trial trans., vol. III, at 880.

seen Bowen at the Wheeler Arena but was first introduced to him on July 5 by Johnny Wheeler as the man for whom Hook'em Henry had been named. Janice Slee, the mother of another rodeo rider, testified that she attends two rodeos a year and first met Bowen on July 5. Johnny Wheeler testified that he telephoned Bowen at home in Tyler at 1:00 a.m. on July 6, just one hour before the murders, and that Bowen had answered the phone.

Bowen took the stand in his defense and denied committing the murders. He testified that he had been convicted of burglary in 1958 and of conspiracy to commit bank burglary in 1967 or 1968, for which he served time in federal prison. Bowen also stated that he had no regular employment, occasionally dealt in jewelry and real estate, and essentially made his living playing poker. Five witnesses

also testified that Bowen was suntanned on July 5, although the State presented testimony that Bowen was light-complexioned at the time of his arrest in late August.

In rebuttal, the State presented what has come to be known as the jet airplane theory. It introduced testimony indicating that, even if Bowen had been at the rodeo late into the evening, he still could have made it to Oklahoma City in time to commit the murders if he had flown in a private jet taking off from an airstrip near the rodeo grounds and landing in the Downtown Airpark in Oklahoma City. However, the State introduced no evidence that Bowen had actually made such a flight. At the first motion for new trial, Bowen presented expert testimony that the Tyler airstrip was in fact abandoned and that neither it nor the Downtown Airpark could accommodate during

darkness the kind of jet aircraft capable of flying from Tyler to Oklahoma City within the necessary time. One expert who had inspected the Tyler airstrip testified that a jet airplane would have left impressions on its surface and that a jet could not have taken off from that airstrip in at least two years. There was also testimony that other airports in Tyler and Oklahoma City would not accommodate the required time frame.

D. The Lee Crowe Material

In April 1983, while Bowen's direct appeal was pending, his attorneys learned that Oklahoma City police had considered as a primary initial suspect in the murders a police lieutenant from South Carolina named Leonard Lee Crowe. From August 1980 until the trial in March 1981, information concerning Crowe was contained in reports in the file of the Oklahoma City Police Department. This

material was known to one or both of the assistant district attorneys who prosecuted Bowen, and was possibly known to the district attorney himself, who was chief trial counsel. A second class of information, the Deana Burris testimony, was not known by either the prosecution or defense until 1983.[2] Finally, some of the Lee Crowe material which was contained in the prosecutions's file in 1980 was not obtained by the defnese until the federal hearings in this csae over five years later.

1. Material in State's File Introduced at State Hearing

Evidence was presented at the hearing on the second motion for new trial that the following information about Crowe was

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[2]Bowen's lawyers became aware of Crowe when they were contacted by South Carolina law enforcement agents regarding the second interview with Deana Burris. See infra Part I(D)(2).

documented in the prosecution's file at the time of trial. Crowe, who matched the description of the shooter, was a white man, six feet two inches tall, weighing 225 pounds, with salt and pepper hair, a beer belly, a pale complexion, no mustache, and no eyeglasses. He occasionally wore a baseball cap and habitually carried a .45 caliber pistol with unusual and expensive silver-tipped, hollow point ammunition. Before the shootings, Crowe lived in North Charleston, South Carolina with Patsy Peters, the former wife of Ray Peters. In the first week of July 1980, Crowe and Patsy came to Oklahoma together and stayed with the Forgusons, Patsy's family, in Mannsville, Oklahoma, approxiamtely 130 miles from Oklahoma City. While in Oklahoma, Patsy and Crowe had gone to Madill to visit Mae Margraves, the mother of Ray Peters. Margraves told police she

thought it strange that Patsy did not introduce her companion, whom Margarves described as a white man in his late forties, six feet two inches tall, 225 pounds, with salt and pepper hair, and wearing a cap. Margie Forguson, Patsy's mother, told Oklahoma City detectives that on the night of the murders she and another daughter had gone to a Jehovah's Witnesses Convention in Oklahoma City and that she believed Crowe stayed home with her husband. Crowe and Patsy left the Forgusons on July 6 and returned to South Carolina, where Crowe resumed is duties at the Hanahan Police Department. Shortly thereafter he resigned.

Oklahoma City detectives learned that sometime during the first week of July, Crowe had gone to Irving, Texas, where he applied for a position as a police officer. The detectives flew to Irving and obtained a photograph of Crowe taken

just a few days before the murders. Although the photo shows Crowe with a mustache, when he returned to Hanahan on July 8 the mustache was gone. When police presented Crowe's picture to witnesses Chilton and Pitchford in Group No. 2 of the photo array, they used the picture taken in Irving although they knew that the suspect had no mustache and that Crowe had returned to South Carolina without a mustache.

South Carolina authorities furnished Oklahoma City police a fingerprint card and photograph of Crowe in uniform as well as spent casings from his .45 caliber pistol requalification. The fingerprint and ballistic evidence did not match the evidence from the murder scene.

By July 28, 1980, Oklahoma City detectives had learned from a confidential informant, reportedly Harold

Behrens, that Peters was killed because he had "ripped off" Paul Mazzell, the reputed head of organized crime in Charleston, South Carolina, in a Dilaudid deal, and that the hit man had come from Charleston. See rec., vol. II, 2d motion transc., at 173-74.[3] Some of this information was contained in the district attorney's file at the time of trial in the "black book," see infra Part I(D)(3).

A police report in the book, dated August 9, 1980, contained the following information provided by Behrens. Ray Peters had been involved in drug trafficking in Charleston. Approximately a year earlier, Peters' partner "Rick" had been abducted from a convenience

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[3]The transcript of the 1983 hearing before Judge Naifeh on the second motion for new trial is referred to herein as "2d motion trans." The trasncript of the 1981 hearing before Judge Naifeh on the first motion for new trial is contained in volume II of the trial transcript and is refered to as "1st motion trans."

store by two individuals and killed, and his body had never been recovered. Rick was killed "because he had double crossed some big time Dilaudid Dealers in Charleston, South Carolina. RAY PETERS was also suspected of double crossing the dealers . . . ." Def. fed. habeas ex. 1A (report of B. Horn dated Aug. 9, 1980 regarding suspects Coy Hines, Jeno Hines, and Bubba Hines).

A written report by South Carolina law enforcement agent Dean Powell dated August 3, 1980 was introduced at the state hearing. Although this report was not in the prosecution's file, it does corroborate information contained in the file. The report stated that Ray Peters was involved in the Charleston Dilaudid trade with Ricky Seagreaves, Peters, and Behrens through a source in Oklahoma City. Peters and Seagreaves supposedly cheated Mazzell in a Dilaudid deal in

1978. In October of that year, Seagreaves was kidnapped from a convenience store and had not been heard of since. Confidential informants in both Charleston and Oklahoma City reported that Danny Hogg and Eddie Merman kidnapped and killed Seagreaves for Mazzell. Lee Crowe was close to Danny Hogg and had been observed at Hogg's apartment before and after Crowe resigned from the Hanahan Police Department. South Carolina authorities considered Crowe the prime suspect in Peters' murder.

2. The Deana Burris Testimony

Information provided by a South Carolina woman named Deana Burris was not known by either the prosecution or the defense until 1983. Bowen offered the Burris testimony at the second motion for new trial as newly-discovered evidence.

Burris testified that in June 1980 she shared an apartment in Hanahan with

Lee Crowe and Patsy Peters. She and Patsy worked out of the apartment as prostitutes and Crowe, who was with the Hanahan Police Department, provided them with "protection." Patsy was Crowe's girlfriend although Burris had had sexual intercourse with Crowe on one occasion. Over a period of several nights in June 1980, Burris heard Crowe and Patsy planning to kill Ray Peters. Patsy did not want Ray involved with their children. Crowe told Patsy to call Ray in Oklahoma and have him come to Charleston, where Crowe would kill him. Patsy called Ray, who declined. Ray subsequently told Burris that he would never come to Charelston because Patsy was living with a cop. Shortly after these conversations, in late June, Crowe and Patsy went to Oklahoma. Burris talked with Patsy on the telephone three or four times after Ray was killed. Each time Patsy inquired

whether anyone had been asking questions about Crowe. Patsy told Burris to be quiet and to advise her of any inquiries about Crowe. Burris testified that during this period of time she was taking Quaaludes provided by Crowe but that her memory of the events was good.

Burris first told her story to South Carolina law enforcement agent Chad Caldwell in November 1981 in connection with his investigation of the Ricky Seagreaves kidnapping. At that time, Caldwell was unaware of the arrests or convictions in the Guest House murders and put little stock in Burris' story because he believed she was taking drugs. After learning that Bowen and Behrens had been convicted, Caldwell again interviewed Burris in April 1983. Burris was not then taking drugs and told the same story. Convinced of her truthfulness, Caldwell

forwarded the first and second statements to Oklahoma City detectives.

Judge Naifeh found that the Burris testimony was not newly-discovered evidence sufficient to grant a new trial because the defense could have discovered the Crowe material with due diligence, Burris was not a credible witness, and the testimony would not have affected the verdict due to the overwhelming character of the identification evidence. Judge Brett concluded that the evidence at trial was better characterized as "adequate" and that the Burris testimony served to underscore the materiality of the Crowe information although the testimony was neither newly-discovered evidence requiring a new trial nor exculpatory within the meaning of Brady.

3. The Black Book

Not until the first day of the federal hearings in October 1985 did the

State produce the smoking gun of this litigation. Oklahoma City police maintain a loose-leaf binder containing all investigative reports and intelligence information regarding an open case. In August 1980 police turned over to the district attorney the "black book" concerning the Guest House murders. Although the existence of this book was mentioned by an Oklahoma City detective in the state hearings, it was provided to the defense only pursuant to subpoena during the federal proceedings. See def. fed. habeas ex. 1A. a copy of the investigative report concerning the suspect Leonard Lee Crowe, which was contained in the black book, is appended to this opinion.

The black book included the following information about Lee Crowe and Patsy and Ray Peters:

(a) When Patsy was younger she met Ray Peters, who was much older than she. Ray never actually married her but transported her to South Carolina, where she became a prostitute.

(b) Mae Margraves recalled that Ray had phoned Patsy a week or two before his death, and that he told her not to come to Oklahoma City because he did not want to see her but only his children. Ray threatened Patsy, telling her that if she came to Oklahoma City he would tell her parents what she really was. He then hung up the telephone.

(c) Patsy was engaged to Lee Crowe.

(d) Ray Peters' oldest son saw Ray slap Patsy outside the Margraves house, although this did not occur in Crowe's presence.

(e) Margie Forguson, Patsy's mother, never liked Ray because of the way he treated Patsy during their marriage.

When talking to police, Mrs. Forguson appeared extremely nervous and uncomfortable.

(f) Lee Crowe had been employed by the Charleston, South Carolina Sheriff's Department but had been fired a few years before 1980. If Crowe did not leave the Hanahan Police Department as requested by his superiors, he would have been fired because of his involvement with known prostitutes and felons.

(g) Crowe had been under investigation by South Carolina law enforcement agents for the past year as a suspected hit man. On several occasions Crowe had left South Carolina and, upon his return, it was discovered that a homicide had occurred where he had been. (The defense apparently knew the substance of this information in 1983, see rec., vol. II, 2d motion trans., at 276, but the information does not appear in the record in

such specific terms before the appearance of the black book.)

(h) South Carolina law enforcement agents who knew Crowe stated that he had an extremely high temper and that they believed he was capable of killing anyone for money.

(i) Crowe's former girlfriend had a boyfriend who persisted in bothering her. The boyfriend was later shot five times in the head with a small caliber pistol. When Crowe was asked to produce his gun, he said that he had lost it.

II.

THE PROSECUTION'S DUTY TO DISCLOSE

In Brady v. Maryland, 373 U.S. at 87, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or

bad faith of the prosecution." The prosecution violates the Brady rule if after a request by the defense it suppresses evidence which is both favorable to the defense and material to guilt or punishment. See Moore v. Illinois, 408 U.S. 786, 794-95 (1972).

At least prior to the Court's decision in United States v. Bagley, 105 S. Ct. 3375 (1985), the materiality of the evidence was judged according to three distinct standards. First, where the prosecution knew or should have know that its case included perjured testimony, the conviction will be overturned "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97, 103-04 (1976). Second, where defense counsel requests disclosure of particular evidence, the specific request puts the

prosecution on notice of its obligation to disclose. In such a case, the verdict must be set aside if "the suppressed evidence might have affected the outcome of the trial." Id. at 104. Third, where the defense has made a general request for all Brady material, the prosecution is put on no better notice than if no request is made. Where there is no request or a general request, the judgment will be set aside "if the omitted evidence creates a reasonable doubt that did not otherwise exist." Id. at 112.

In its latest exposition of the standards of materiality, the Court in Bagley established a single test applicable to all instances of nondisclosure, including specific request, general request, and no request cases:

> "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a prob-

> ability sufficient to undermine confidence in the outcome."

Bagley, 105 S. Ct. at 3384; see also id. at 3385 (White, J., joined by Burger, C.J., and Rehnquist, J., concurring in part and in judgment). This test was articulated subsequent to the trial in this case.

For the reasons set out below, we agree with the district court that Bowen's counsel made a specific request and that the Lee Crowe material meets the Agurs standard for such situations. We also agree that, even if no specific request had been made, the material satisfies the most restrictive standard in Agurs governing cases where only a general request or no request has been made. Finally, we agree that, although the material does meet the unitary Bagley standard, because both Agurs tests are satisfied there is no need to decide

whether Bagley should be applied retroactively.

III.

THE ORAL REQUEST

Bowen's argument that he need only satisfy the Agurs test governing situations where a specific request was made rests on his assertion that his counsel made such a request orally. The State disagrees. Thus, we must first address whether defense counsel before trial made an oral[4] request for a list of other

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[4]We agree with the federal district court that a specific, oral request which is not on the record is legally equivalent to a formal, written motion when the parties agree that such a request was made. We do not decide under what other circumstances an oral, nonrecord request is legally sufficient as a request for specific exculpatory material. Cf. Zeigler v. Callahan, 659 F.2d 254, 269 n.9 (1st Cir. 1981) (issue not reached because oral request later waived); Fleming v. Kemp, 748 F.2d 1435, 1448 (11th Cir. 1984) (ineffective assistance of counsel claim that counsel failed to file formal Brady motion held frivolous where counsel made oral request at pretrial conference), cert. denied, 106 S. Ct. 1286 (1985); United States v. Montoya,

suspects. Such a request would be a specific request because it gives "the prosecutor notice of exactly what the defense desired," Agurs, 427 U.S. at 107, and is formulated in terms as precise as possible under the circumstances, see Chaney v. Brown, 730 F.2d 1334, 1341-42 (10th Cir. 1984), cert. denied, 105 S. Ct. 601 (1985).

Judge Brett made the following finding of fact concerning the oral request:

> "13. There was no written motion, either general or specific, for exculpatory evidence filed by or on behalf of the petitioner before or during the trial. At the hearing before the undersigned, it was conceded by the parties that approximately a month to six weeks before the jury trial, petitioner's counsel orally requested of the prosecutors (the District Attorney and his assistants assigned to the case) to be provided with the names of 'all other suspencts'. The

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716 F.2d 1340, 1345 (10th Cir. 1983) (specific, oral request made on record at trial).

> prosecutors advised that at the time of the request there was only one suspect and that was Clifford Henry Bowen. On the day of trial, petitioner's counsel served a subpoena duces tecum on the Oklahoma City Police Department to produce its entire investigation filed concerning the Guest House Motel murders. The information hereafter discussed concerning Leonard Lee Crowe was not produced by the Oklahoma City Police Department pursuant to the subpoena duces tecum."

Rec., vol. I, fed. habeas, doc. no. 39, at 10-11 (footnote omitted) (emphasis added).[5]

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[5]In reconstructing how he may have responded to a request for "all other suspects," the district attorney revealed that he distinguishes between "viable" suspects and former or eliminated suspects. He testified at the federal hearing that Bowen was the only viable suspect ever, but that, had the defense asked if he had considered other suspects, he probably would have produced the Lee Crowe material. See rec., vol. VIII, fed. habeas, at 21-23. The superficial appeal of this reasoning passes quickly. A public prosecutor is ethically bound to charge and try only those he believes, and can prove, are guilty. See Model Rules of Professional Conduct Rule 3.8(a) (1984); Model Code of Professional Responsibility DR 7-103(A) (1984). According to the district attorney's

The State contends Judge Naifeh found that no oral request had been made and that this finding must be presumed correct under 28 U.S.C. § 2254(d) (1982). The State further contends Judge Brett erroneously found that in the federal hearing the State conceded a request had been made,[6] and that he failed to articulate his reasons for overriding the

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analysis, if a prosecutor believes that other "viable" suspects exist two months before a capital trial, he is obligated to dismiss the charges against the defendant. A request for all other suspects, therefore, must necessarily imply former or discarded suspects.

[6]As an initial matter, the State urges that the federal district court erred in taking further testimony. We disagree. Bowen alleged that he had not received a full and fair opportunity to develop certain facts at the state hearing. The district court ordered the State to advise whether the claims raised a factual issue, whether the factual issue had been resolved in the state proceedings, and whether an evidentiary hearing was necessary, in light of the circumstances outlined in 28 U.S.C. § 2254(d). The district court also directed the State to furnish transcripts and findings of the state proceedings in

state determination as required by Sumner v. Mata, 449 U.S. 539 (1981). Bowen argues that the state findings do not preclude the possibility of an oral request and that, even if they do, the state record does not fairly support such a finding. He maintains further that the State's concession at the federal hearing establishes the error of the alleged state factual determination and that we must accept the federal district court's finding of a concession unless it is clearly erroneous. Bowen makes no attempt to deal with the requirements of Sumner.

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which the factual issue was allegedly resolved. After the court granted an evidentiary hearing, it stated that it would permit additional evidence not duplicative of that presented to the state court. See rec., vol. VI, fed. habeas, at 8. Under these circumstances, we believe the federal district court's grant of an evidentiary hearing wsa proper. See Townsend v. Sain, 372 U.S. 293, 310-319 (1963); see also Miller v. Fenton, 106 S. Ct. 445, 450 (1985);

A. The State Court Findings

Judge Naifeh made the following findings which relate to a request by the defense for a list of other suspects:

> "1. That no motion for discovery of exculpatory evidence was filed by trial defense counsel on behalf of the Defendant.
>
> . . . .
>
> "28. That the information regarding Crowe could have been discovered through the exercise of due diligence as the defendant could have requested a list of all suspects prior to trial but failed to do so.
>
> . . . .
>
> "36. That Frank Wright, an attorney for the Defendant, testified he orally asked the District Attorney if there were any other suspects and was told that none existed.
>
> . . . .

LaVallee v. Delle Rose, 410 U.S. 690, 701 n.2 (1973) (Marshall, J., dissenting); White v. Estelle, 556 F.2d 1366, 1368 n.4 (5th Cir. 1977); 17 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 4265, at 670 (1978).

"41. That the District Attorney's office considered the hypnosis of one witness, plus the arrest of a suspect named Simmons, to possibly be exculpatory evidence and that this information was provided to counsel for the Co-Defendant, Harold Behrens, pursuant to a "Brady" motion, but not given to Raymond Burger, trial counsel for the Defendant, because Mr. Burger made no request and apparently discovered this information before trial."

Rec., vol. I, fed. habeas, doc. no. 35, at 1, 5, 6, 8 app. The parties dispute whether these findings preclude the possibility that an oral, informal request was made by Mr. Wright. The Court of Criminal Appeals concluded that:

"Appellant alleges in his appeal and in his second motion for new trial that reversible error occurred when the prosecution failed to deliver exculpatory evidence to defense counsel. However, the record does not reveal that defense counsel made a formal request for exculpatory evidence, though trial counsel contends he made an oral pretrial inquiry as to the existence of other suspects to which the prosecution answered in the negative.

. . . .

> "Appellant asserts the suppression of the allegedly exculpatory evidence regarding these suspects denied him due process of law under the authority of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963). However, as appellant recognizes, no request was made for exculpatory evidence prior to trial."

Bowen, 715 P.2d at 1098 (emphasis added).

It is unclear whether either the state trial court or the Court of Criminal Appeals implicitly decided that no informal, oral request had been made or rather did not reach the issue because they believed that an oral request was not legally equivalent to a motion or written request.[7] If either court did

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[7]The State's proposed findings of fact and conclusions of law submitted to Judge Brett support the latter conclusion. There the State proposed as a finding: "The Court notes that both Judge Naifeh and the Oklahoma Court of Criminal Appeals considered this alleged oral request to be insufficient under Brady." Rec., vol. I, fed. habeas, doc. no. 35, at 34-36. See infra pp. 31-32 for the full context of this statement.

find that no request of any kind had been made, this would be a finding of historical fact, see Townsend v. Sain, 372 U.2d 293, 309 n.6 (1963) (citing Brown v. Allen, 344 U.S. 443, 506 (1953) (opinion of Frankfurther, J.)), entitled to a presumption of correctness by federal courts under 28 U.S.C. § 2254(d).

B. The Federal Hearings

At the federal hearings several members of the defense team testified on the subject of oral requests. Trial counsel Burger stated that in early 1981 he had asked for exculpatory material generally and was shown a thin file which did not contain any such material. See rec., vol. VII, fed. habeas, at 15, 79-81. Co-counsel Frank Wright testified that in early 1981 he had made a direct oral inquiry of the district attorney regarding the existence of other suspects and was told that there were none. See

rec., vol. VI, fed. habeas, at 114-16, 125, 132, 151-52; see also id. at 78-79 (testimony of Mike Evett), id. at 159 (testimony of Clifford Henry Bowen).

In the closing arguments, the following colloquy took place between Judge Brett and Jack Zimmerman, Bowen's lawyer on appeal:

> "THE COURT: Of course, we've also got a problem in this case that is somewhat troublesome to me. I take it the record shows clearly that, first, there was no discovery motion, particularly Brady motion, prior to trial, right?
>
> "MR. ZIMMERMAN: There was no written motion prior to trial. That's what the record shows, yes, Your Honor.
>
> "THE COURT: Does our record show that -- at least, there is no dispute in the record that I've heard here, and from what [District Attorney] Macy said I take it he doesn't dispute it -- that most probably sometime either in January of '81 or early February of '81 Mr. Macy, probably in the presence of one of his assistants where Mr. Frank Wright was present and probably also Mr. Burger was present, there was an oral request for information concerning any other suspects. Is this record clear here

that that oral request was made and there is no dispute about that?

"MR. ZIMMERMAN: Yes, sir. If I may, here is what I believe there is no dispute about.

"THE COURT: All right.

"MR. ZIMMERMAN: There is no dispute there was any written Brady motion. There is no dispute --written by either Frank Wright or Raymond Burger. There is no dispute that there was only one specific request made orally, and that was for a list of suspects. There was no specific request for any other information, and we acknowledge that, we concede that.

"But the evidence is clear from the second motion for a new trial that Frank Wright specifically asked Bob Macy -- Bob Macy had the opportunity to cross-examine and his only cross-examination question was to inquire as to the date that that meeting occurred. I think Mr. Macy also acknowledged today that there was a request for suspects. Mr. Burger's uncontested tesitmony here, sponsored by the State, was that there was a specific request for suspects.

"THE COURT: All right. Well, I take it in your mind . . . a request for other suspects, if made by Mr. Bowen's counsel, would in effect be a request for other suspects other than my client.

"MR. ZIMMERMAN: Yes, Your Honor, and I think it was clear it was in that context."

Rec., vol. IX, fed. habeas, at 22-24. Robert Nance, representing the State, voiced no objections to these assertions by defense counsel and the court. During his closing argument Nance and the court had the following exchange:

"THE COURT: Mr. Nance, do you agree that the state of our record here is essentially that an oral request was made by Mr. Frank Wright and/or Mr. Raymond Burger before Mr. Macy and/or one of his prosecutors on the prosecution team in the January, 1981 or early February '81 time frame for a list of all other suspects or all suspect? Does our record reflect that?

"MR. NANCE: Our record reflects and my notes -- well, I don't recall exactly what I wrote, but yes, Mr. Wright asked the question. Mr. Macy, as I recall, didn't remember it.

"THE COURT: Well, my recollection is Mr. Wright stated it emphatically occurred. Mr. Burger stated it emphatically occurred. Both of them stated that the prosecutor replied there are no other suspects other than Clifford Henry Bowen. And Mr.

> Macy today said, 'I don't recall the conversation, but if they say it took place I assume it did.'
>
> "MR. NANCE: I think that's correct.
>
> "THE COURT: So, is the state of our record here that that's undisputed?
>
> "MR. NANCE: I'd say so in this proceeding."

Id. at 45-46 (emphasis added). Later in his argument Nance appeared to contradict these concessions when he stated that "[o]ur view is and continues to be at this point that there was no request." Id. at 51.

From a review of the cold record, we can ascribe no other meaning to these statements than a concession, as Judge Brett found. The proposed findings of fact and conclusions of law which the State submitted to the federal court confirm that it did not dispute the existence of an oral request but argued instead that the request was legally insufficient:

"[T]he Court doubts that a casual question, sometime early in 1981, was sufficient to alert the prosecution that defense counsel wanted exculpatory material under Brady. It appears from the testimony that a casual question was asked and honestly answered. Mr. Wright evidently did not make any follow-up in order to clarify that his request was for exculpatory evidence within the meaining of Brady. At the evidentiary hearing conducted in the present case, Mr. Macy did not even recall the question being asked. If the desired information regarding other suspects was important enough to the defense to matter in trial, it is not unreasonable to require the defense to file a written motion for exculpatory evidence under Brady . . . . The Court believes that a casual question, whether asked in the office, in the hallway, or outside the courtroom, does rise [sic] to the dignity of a request under Brady unless it firmly and unquestionably puts the prosecution on notice that the defense is inquiring about the exculpatory evidence.

"Mr. Wright's question fell far short of this standard. He did not ask regarding rejected investigative leads or other persons who were suspects at other times. He only asked if there were someone else who might have committed the crime. For reasons more fully set out below, the Lee Crowe material did not fit within that question. Therefore, there was no improper

failure to disclose exculpatory evidence.

> "The Court is reluctant to overturn a final criminal conviction, for the most serious of crimes, on collateral attack based upon a dimly remembered question asked years before . . . . The Court notes that both Judge Naifeh and the Oklahoma Court of Criminal Appeals considered this alleged oral request to be insufficient under Brady . . . . The Court concludes that overturning this conviction based upon a single oral question, never followed by formal motion, would unduly interfere with the finality of legitimate state criminal judgments . . . . The Court simply does not believe that the question asked by Mr. Wright rose to the dignity of any request whatsoever under Brady v. Maryland, supra, and refuses to treat it as such."

Rec., vol. I, fed. habeas, doc. no. 35, at 34-36 (excerpt from State's proposed conclusions of law) (emphasis added).

The State now attempts to elude the finding of a concession. It first contends that its persistent avowed reliance on the state court findings is inconsistent wiht a concession that those findings are wrong. This argument not

only assumes that the state court findings are complete and unambiguous but also fails to explaint how a concession would not undermine those findings. Second, the State argues that Macy's lack of recollection precluded it from unequivocally asserting that no request had been made and that its silence on the issue does not constitute an affirmative concession. Unfortunately for the State, we cannot require the district courts to observe such semantic niceties. For the reasons set out below, we conclude that the finding of an oral request for other suspects is supported by both the federal and sttae court records and is not clearly erroneous. See rec., vol. III, lst motion trans., at 905, 973; id. vol. II, 2d motion trans., at 12-13. It remains to be determined, however, what effect the presumption of correctness accorded state court findings by 28 U.S.C. § 2254(d) has

on the district court's finding that the State conceded an oral request was made.

C. Overcoming the Presumption of Correctness

As we have stated, if the state court did find that no request of any kind had been made, federal courts must presume this finding correct unless one of the seven conditions specified in section 2254(d) applies.[8] If none of these

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[8]Section 2254(d) provides:

"(d) In any proceeding instituted in a federal court by an appliction for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit --

(1) that the merits of the factual dispute were not resolved in the

State court hearing;

(2) That the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly

conditions applies, or unless the habeas court concludes that the state court finding is not fairly supported by the record, the petitioner has the burden of establishing by convincing evidence that the state court finding is erroneous. See Sumner, 449 U.S. at 550. The State's concession establishes that the facts material to the question of a specific, oral request were not adequately

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> And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

28 U.S.C. § 2254(d).

developed at the state court hearing. See 28 U.S.C. § 2254(d)(3); cf. rec., vol. III, 1st motion trans., at 905, 973. Moreover, to the extent the state court findings can be construed to imply that the defense made no specific, oral request for a list of other suspects, the concession convincingly establishes the error of that determination. Bowen therefore has amply met his burden under section 2254(d).

Remaining for our consideration is Sumner's requirement that a habeas court include in its opinion granting the writ the reasoning which led it to conclude that one of the first seven factors was present, or the reasoning which led it to conclude that the state finding was not fairly supported by the record. See Sumner, 449 U.S. at 551. The Supreme Court has stated that:

> "Such a statement tying the generalities of § 2254(d) to the

> particular facts of the case at hand . . . will have the obvious value of enabling courts of appeal and this Court to satisfy themselves that the congressional mandate has been complied with. No court reviewing the grant of an application for habeas corpus should be left to guess as to the habeas court's reasons for granting relief notwithstanding the provisions of § 2254(d)."

Id. at 551-52. Accordingly, we must decide whether Sumner applies and, to the extent it does, whether its requirements were met in this instance.

At the outset, it is unclear whether Sumner is on all fours with the issue of the oral request. In Sumner the Ninth Circuit reversed the conclusion of both the federal district court and the state courts by finding that a pretrial photographic identification procedure was impermissibly suggestive. The Ninth Circuit made this determination based on the identical record considered by the federal district and state courts and used the same constitutional standard. See

id. at 543. The Supreme Court noted that the Ninth Circuit failed to apply the presumption of correctness and did not even refer to section 2254(d) in its opinion. See id. at 547. The Court criticized this apparent abrogation of the congressional mandate, noting that:

> "When Congress provided in § 2254(d) that a habeas court could not dispense with the 'presumption of correctness' embodies therein unless it concluded that the factual determinations were not supported by the record, it contemplated at least some reasoned written references to § 2254(d) and the state-court findings."

Id. at 549 (emphasis in original); cf. S. Rep. No. 1797, 89th Cong., 2d Sess., reprinted in 1966 U.S. Code Cong. & Ad. News 3663, 3663-66.

Here, the federal district judge did not base his determination solely on the record considered by the state court but had the benefit of the concession, evidence not before the state judge. The district judge, moreover, repeatedly

indicated his acute awareness of the presumption of correctness under section 2254(d). See rec., vol. I, fed. habeas, doc. no. 6, at 3; id., doc. no. 39 at 24. Although the court's discussion of section 2254 appears to be linked more to the question of exculpatory evidence than to the oral request issue, the court did refer to the state court determination when it found the concession.[9] Apparently

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9 The court's footnote to this finding stated;

> "2 There was no concession or stipulation at any hearings before the trial court that an oral request was made by the defendant for 'all other suspects; previous to the commencement of trial. Had such a stipulation been made, it would have required altering the trial court's Finding of Fact No. 28 and 41, which state that no such request for 'all other suspects' was made by or on behalf of the defendant prior to trial."

Rec., vol. I, fed. habeas, doc. no. 39, at 11.

the district court did not deem it necessary to tie section 2254(d) to the oral request issue because it believed that the concession rendered the fact question moot.[10]

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[10] The following exchange took place at the hearing before the district court on the motion to stay:

> "THE COURT: On the record was it not stated to me, sitting as the Court in Oklahoma City at the hearing, that there was no disagreement tht such a request was made? Isn't that in this record? At least I've read it in this record.
>
> "MR. NANCE: Well, Your Honor, if it's in the record I co not recall it. I don't recall it.
>
> "THE COURT: I specifically recall it. I asked, 'What is agreed on that subject? Was there an oral request or was there not an oral request' made some four to six weeks before trial commenced in mid March of 1981. So obviously that was not before Judge Naifeh, was it?
>
> "MR. NANCE: That's correct.
>
> "THE COURT: Neither was it before any of these appellate tribunals.
>
> "MR. NANCE: Your Honor, excuse me. It may have been before Judge Naifeh.

In our view, the district court adequately complied with the requirements of Sumner and section 2254(d). The concession constitutes the State's admission that the state court determination was erroneous to the extent it can be interpreted to mean that no oral request was made. This state of affairs is analogous to a stipulation of a given set of facts. The district court has explained the basis of its finding to our satisfaction and with due deference to the state court proceedings.

He may have --

> "THE COURT: That that was conceded?
>
> "MR. NANCE: On, not conceded.
>
> "THE COURT: He made a specific finding there was no such request, and when you gentlemen conceded before me there was such an oral request, that kind of lays that matter to rest, at least insofar as that being a fact."

Rec., suppl. vol. I, trans., Jan. 23, 1986 hearing on motion to stay, at 14-15.

IV.

THE WITHHELD EVIDENCE

Before we review the evidence to determine if a Brady violation occurred, we note that the question of materiality and the possible effect of the withheld evidence on the verdicts is a mixed question of fact and law. The state court's ultimate conclusion under Brady therefore is not entitled to a presumption of correctness under section 2254(d) and is open to review by federal courts. Chaney, 730 F.2d at 1344-46.

Bowen argues that the Lee Crowe material is exulpatory within the meaning of Brady because it could be used to impeach the identification witnesses and because it casts doubt upon his guilt. We will examine each of these contentions according to both of the Agurs tests as well as the Badley test.

A. The Lee Crowe Material as Impeachment Evidence

Impeachment evidence merits the same constitutional treatment as exculpatory evidence. Suppression of material which could be used to impeach witnesses violates the Constitution if it deprives the defendant of a fair trial. E.g., Bagley. 105 S. Ct. at 3380-81 (evidence of bias); Giglio v. United States, 405 U.S. 150, 154 (1972) (same). The case agsinst Bowen stands or falls upon the testimony of the two identification witnesses. One of the assistant district attorneys who prosecuted Bowen agreed that in this case identification is a key issue. See rec., vol. II, 2d motion trans., at 223 (testimony of David Hardwicke). As the district attorney himself conceded, the evidence to convict would have been insufficient without the testimony of the two witnesses. He stated under cross examination:

"Q. If you take out the testimony of Mary Chilton, who had misidentified someone else earlier, and Carrie Pitchford, there is no case against Henry Bowen, is there?

A. There is not a total case. There is a partial case.

Q. Could you have gotten a conviction on the evidence that you had, subtracting Mary Chilton and Carrie Pitchford?

A. No.

. . . .

Q. Now, Mr. Macy, let me ask you this question. If the testimony of Mary Chilton and Carrie Pitchford had been impeached at trial significantly or their identification in court had been significantly attacked or impeached, is there a reasonable probability that Mr. Bowen would be free today?

A. There was a serious attempt to impeach it.

Q. That wasn't my question, Mr. Macy. Had they been impeached, because their testimony was the heart of the case, isn't there a reasonable probability that the verdict would have been not guilty?

A. That's true."

Rec., vol. VIII, fed. habeas, at 68 (testimony of Robert H. Macy). Thus,

evidence impeaching these witnesses would take out the heart of the State's case and greatly undermine the guilty verdicts.

Had the defense team known about Lee Crowe, it could have made adroit use of his marked resemblance to the description of the suspect. Like the described suspect, Crowe was a white man, six feet tall, 225 pounds, with salt and papper hair, a beer belly, pale complexion, and no eyeglasses. Crowe was in his late thirties, although Mae Margraves had described him as in his late forties, and the suspect was originally described as between thirty-five and fifty years old. Crowe was known to wear a baseball cap and in fact was wearing a cap when he and Patsy Peters visited Mae Margraves in Madill, Oklahoma just a short time before the shootings. Crowe also may not have had a mustache at the time of the murders

because the evidence showed he had shaved his sometime between July 1 and July 8. The fact that Mae Margraves' description of Crowe did not mention a mustache makes it likely that the mustache was gone before July 6.

The State understandably makes much of the fact that the two witnesses chose Bowen and not Crowe from the photo arrays, and Bowen in a live lineup. Had the Lee Crowe material been made available to the defense, however, the frailties of these identification procedures would not have been difficult to demonstrate. As we have noted, Oklahoma City police used a picture of Crowe with a mustache although the described suspect had none and they knew that Crowe had shaved his mustache although the described suspect had none and they knew that Crowe had shaved his mustache around the time of the murders.

As we have also noted, the photo array featuring Crowe contained three of five men with mustaches, and the array featuring Bowen contained no ment with mustaches, and the array featuring Bowen contained no ment with mustaches. The picture of Bowen, moreover, showed him without the horn-rimmed eyeglasses he normally wore and which Detective McBride remembered so well, see supra p. 7. Although both Crowe and Bowen appear somewhat pale-complexioned in the photographs, an Oklahoma City detective testified that Crowe's picture appears paler than Bowen's. See rec., vol. II, 2d motion trans., at 160 (testimony of William L. Cook). In July 1980 South Carolina law enforcement agents described Crowe to Oklahoma City detectives as pale-complexioned, while the defense introduced testimony at trial that Bowen was suntanned at the time of the murders.

When the State attempted to counter this evidence, it produced testimony only that Bowen was pale at the time of his arrest in late August. Judge Brett viewed Bowen in person and found that his complexion is medium and capable of tanning. When this finding was made, Bowen had been on death row for over four years and likely had had little exposure to the sun. The man seen loitering at the Guest House, moreover, wore a baseball cap, which may have obscured his features. Finally, although the witnesses did pick Bowen out of a live lineup, they were never given the chance to view Crowe in person. If the defense had known about Lee Crowe at trial, the reliability of the identifiction procedures could have been undermined and the witnesses impeached.

The State urges that Moore v. Illinois, 408 U.S. 786, is analogous. In Moore the Court found no Brady violation

in the prosecution's failure to disclose certain statements of a witness named Sanders, who testified that the defendant had boasted in a bar called the Ponderosa Tap that he had shot a bartender in a nearby city. Although Sanders identified Moore at trial as the boaster, he previously had told police that the man was "Slick," who was a different person from the defendant. The Court stated:

> "We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case. Here, the elusive 'Slick' was an early lead the police abandoned when eyewitnesses to the killing and witnesses to Moore's presence at the Ponderosa were found."

Id. at 795. Thus, the Court emphasized that two eyewitnesses had identified the defendant as a participant in the shooting and that two other witnesses besides Sanders had identified the defendant as the boaster. In contrast, the only identification evidence against Bowen was

significantly impeachable with the withheld material. Additionally, there was no evidence that "Slick," unlike Crowe, had motive, opportunity, and ability to kill the bartender. See infra Part IV(B). We are not persuaded, therefore, that Moore controls our consideration of this appeal.

The testimony of Chilton and Pitchford as presented at trial may have supported the verdict, but, like much identification testimony, it was not flawless. Chilton's credibility is undermined by her hypnosis, and her possible misidentification of William Wayne Simmons in a photo array and a police detective in a lineup. Pitchford had viewed the suspect from a window eighty-five feet away. She said he wore a white T-shirt while Chilton said he wore a medium blue long-sleeved work shirt. Had the Lee Crowe material been disclosed

to the defense, the backbone of the State's case might well have been irretrievably broken.

B. The Lee Crowe Material Casts Doubt Upon Bowen's Guilt

As the State has reminded us, a Brady inquiry is grounded in an "overriding concern with the justice of the finding of guilt." Agurs, 427 U.S. at 112. On the state of the evidence, the Lee Crowe material creates reasonable doubt that Bowen committed the Guest House murders. Additionally, in the hands of the defense, it could have been used to uncover other leads and defense theories and to discredit the police investigation of the murders.

The only supportable motive Bowen could have had to commit the murders was money. The State proceeded on a theory of killing for hire, although it never proved that Bowen had been paid. In seeking the death penalty, the State

initially charged that Bowen committed the murders for remuneration, but subsequently abandoned this allegation because it concededly had no proof of payment.

Lee Crowe, in contrast, could have been motivated by several factors. First, his fiancee Patsy had been married to one of the victims, Ray Peters, who had threatened and struck her just prior to his death. Deana Burris could have testified that Patsy wanted Ray dead and that Crowe was willing to kill him. Although the Burris testimony was not known to the prosecution at trial and therefore is not exculpatory within the meaning of Brady, an investigation of Crowe and Patsy might well have led to their former roommate. See Bagley, 105 S. Ct. at 3384 (incomplete response to specific request may effectively represent to defense that evidence does not exist

and cause defense to abandon lines of independent investigation). Second, Crowe's ties with the Charleston, South Carolina organized crime syndicate and its connection with Ray Peters, see supra pp. 15-16, support a hypothesis that Crowe killed Peters. While this information was not in the prosecution's file, an investigation of Crowe undoubtedly would have led to the South Carolina authorities who had been investigating him for over a year. Third, Crowe could have committed the murders for money alone, just as easily as Bowen. Cf. Moore, 408 U.S. 786 (no evidence that misidentified suspect had motive).

The State vigorously contends that no one placed Crowe at the scene of the murders although two witnesses put Bowen there. We find unpersuasive this reliance on testimony which could have been impeached with the Lee Crowe material.

Crowe had a distinct opportunity to commit the murders. By all accounts he and Patsy Peters were staying at the home of the Forgusons in Mannsville, Oklahoma. When Oklahoma City detectives interviewed Margie Forguson, she told them she was away on July 5 and 6 and believed that Crowe stayed home with her husband and Patsy on the night of July 5. An Oklahoma City detective testified that, when police finally interviewed Mr. C. B. Forguson in 1983, he stated that Crowe had stayed at the house that night. Aside from Mr. Forguson's possible bias and disingenuousness, we are left to wonder what time he retired that evening and whether Crowe still could have traveled the 130 miles to Oklahoma City by 2:00 a.m. In the sic year history of this litigation, no one has ever sworn to being with Crowe on the night of the murders. These facts differ widely from the

situation in Moore, 408 U.S. 786, where Slick was never placed near the crime scene and the withheld evidence about him provided insignificant impeachment use, particularly in light of other identification witnesses.

Bowen, in contrast, offered twelve alibi witnesses who testified that he was at a rodeo in Tyler, Texas, 300 miles from the crime scene, until midnight to 1:00 a.m. The prosecution's attempt to rebut this testimony with the jet airplane theory is at best speculation and at worst fantasy. While it surely was the province of the jury to weigh the credibility of Bowen's alibi, the jury was never given the chance to learn about Lee Crowe. We believe that had that opportunity been given, Bowen's alibi would have been viewed in a different light. Cf. Chaney, 730 F.2d at 1350-51 (withheld evidence would not have affected

murder convictions where strong circumstantial evidence existed showing participation at least as aider and abettor).

Lastly, Crowe had the ability to commit the murders. He habitually carried the same kind of gun as the murder weapon and used the same unusual and expensive ammunition.[11] South Carolina law enforcement authorities believed he was capable of killing anyone for money.

The withheld evidence also raises serious questions about the manner, quality, and thoroughness of the

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[11] The murder weapon was a .45 caliber automatic with Winchester Western silver-tipped, hollow point bullets. Crowe carried a .45 caliber handgun as his police service weapon and used silver-tipped bullets. At the time of the murders Winchester Western silver-tipped .45 caliber bullets had not been long on the market and thus were unusual. Rec., vol. II, 2d motion trans., at 49 (testimony of Chad Caldwell). Because silver-tipped bullets are too expensive for target practice, they have no real purpose but to kill people. Id. at 74.

investigation that led to Bowen's arrest and trial. A commone trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible Brady violation. See Lindsey v. King, 769 F.2d 1034, 1042 (5th Cir. 1985).

If the Lee Crowe material had been disclosed, the defense could have pointed out that Bowen was charged even though he had a confirmed alibi and Crowe did not. Crowe was eliminated as a suspect based on Mrs. Forguson's hearsay statement that she believed Crowe had stayed in Mannsville the night of the murders. Police did not substantiate or corroborate her statement of belief. Crowe was eliminated as a suspect even though police knew that he had ample motivation to kill Ray Peters. Also questionable were the

identification procedures used to eliminate Crowe and to charge Bowen. The defense could have cross-examined the detectives about their decision to use the photograph of Crowe with a mustache when they knew tht the described suspect had none and that Crowe had shaved his around the time of the murders. Why Crowe was never put in a live lineup is also troubling. With this material, a defense lawyer of less than heroic skill could have theorized that the State found it easier to charge an admitted gambler and ne'er-do-well rather than a police officer, even an allegedly corrupt one.

C. The Duty to Disclose Existed Either With or Without a Request

Because we hold that the defense made a specific request for a list of other suspects, the standard of materiality for judging the suppressed evidence is whether it might have affected the outcome of the trial. See Agurs, 427 U.S. at 104. We

need not take judicial notice of the vagaries of eyewitness accounts to state with assurance that the Lee Crowe material meets this standard. Alternatively, even if no request had been made, the withheld material "creates a reasonable doubt that did not otherwise exist" and therefore meets the test where a general or no request has been made. See Agurs, 427 U.S. at 112. Where, as here, identity is in issue, a creditable alibi defense is presented, and no physical evidence ties the defendant to the crime, material showing that someone resembling the defendant had motive, opportunity, and ability to commit the crime is "sufficient to undermine [our] confidence in the outcome" of the trial. The Crowe material also meets the Bagley requirement of a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have

been different." Bagley, 105 S. Ct. at 3384.

V.

CONCLUSION

The orders of the federal district court setting aside the three murder convictions of Clifford Henry Bowen as constitutionally invalid, granting the writ of habeas corpus conditionally, and imposing conditions for Bowen's release including the posting of a $100,000 appearance bond, are affirmed.[12] We also

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[12]Generally, a district court ruling in the petitioner's favor in a habeas case provides a reasonable time in order to afford the State an opportunity to re-try the defendant or otherwise correct the constitutional infirmity. See, e.g., Carter v. Rafferty, 781 F.2d 993, 994 n.1 (3d Cir. 1986); Martinez v. Turner, 461 F.2d 261, 265 (10th Cir. 1972). In this case, the writ issued immediately. In light of the conditions of release imposed by the district court, see supra p. 4, to secure "Petitioner's appearance at all future proceedings herein," the Fed. R. App. P. 23(c) provision on immediate release, and the 28 U.S.C. § 2243 directive that the district court "dispose of the matter as law and justice

agree with the district court that the effect of its judgment in granting the writ of habeas corpus was to invalidate the convictions and death sentences for constitutional infirmities. Nonetheless, the information filed in state court charging Bowen with three counts of first degree murder has not been set aside, and retrial on these charges is not barred. Irvin v. Dowd, 366 U.S. 717, 728 (1961); Bromley v. Crisp, 561 F.2d 1351, 1364 & n.13 (10th Cir. 1977) (en banc), cert. denied, 435 U.S. 908 (1978); see also Blackledge v. Perry, 417 U.S. 21, 31 n.8 (1974). The State is also not barred, upon Bowen's release under the district court's order, from retaking custody of Bowen under the murder charges in the

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require," we conclude that the district court in these circumstances did not abuse its discretion in ordering the immediate issuance of the writ of habeas corpus.

information, see Irvin, 366 U.S. at 728 ("petitioner is still subject to custody under the indictment filed by the State . . ."), and seeking any protective orders under state procedure to ensure Bowen's appearance for retrial in accordance with state law. Carter v. Rafferty, 781 F.2d 993, 997-98 (3d Cir. 1986).

When the mandate issues, we will provide, as the State has requested, for a stay of fifteen days in order to afford the State an opportunity to seek a stay from the United States Supreme Court, or a Justice thereof, of the mandate and judgment of this court. If the State applies within such time for such a stay, our stay shall remain in effect pending disposition by the Supreme Court, or the Justice, of the State's application for a stay.

IT IS SO ORDERED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-85-1868-BT

CLIFFORD HENRY BOWEN,
Prisoner #113852,

Petitioner,

v.

JOHN N. BROWN, Warden,
Oklahoma State Penitentiary,

Respondent.

OPINION, FINDINGS OF FACT
AND CONCLUSIONS OF LAW

This matter is before the Court on petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 to relieve the petitioner of restraints on his liberty following convictions on three counts of murder in the first degree in the District Court of Oklahoma County, Oklahoma City, Oklahoma, Case No. CRF-80-3397. The petitioner has ex-

hausted his state remedies as a result of a direct appeal to the Oklahoma Court of Criminal Appeals, denied on November 30, 1984, a rehearing being denied on March 8, 1985; and thereafter, the denial of a petition for writ of certiorari to the Untied States Surpeme Court on July 1, 1985.

For the reasons stated below, the petitioner's writ of habeas corpus is granted due to failure of the State of Oklahoma to reveal certain material exculpatory evidence; it being thereby not necessary to address the alleged ineffective assistance of counsel issue.

FINDINGS OF FACT

1. The petitioner is at this time restrained of his liberty by the Oklahoma Department of Corrections in the McAlester Penitentiary, Pittsburg County, Oklahoma as a result of a jury verdict reached on March 13, 1981. The petitioner entered a plea of not guilty in

the case of State of Oklahoma v. Clifford Henry Bowen in the District Court of Oklahoma County, Oklahoma, Case No. CRF-80-3397, but was convicted following a jury verdict on March 13, 1981, of three counts of murder in the first degree by acting in concert with a co-defendant, one Harold Behrens. Petitioner's sentence was fixed by a jury at death on each count. A motion for new trial was filed on April 9, 1981 and an amendment to motion for new trial was filed on April 29, 1981. In his amendment to motion for new trial before the State trial court and on appeal, the petitioner contended that federal constitutional error had occurred when he was denied effective assistance of counsel at both stages of his capital murder trial. On May 7, 1981, the District Court of Oklahoma County, State of Oklahoma, overruled the motion for new trial. The petitioner filed his appellate brief with

the Oklahoma Court of Criminal Appeals on February 24, 1982. On April 27, 1983, the petitioner filed his second motion for new trial, and the Court of Criminal Appeals remanded the case to the trial court to determine if an evidentiary hearing was appropriate. The trial court ordered such evidentiary hearing and it was held on September 29 and 30th, 1983. The petitioner contended in his second motion for new trial before the State trial court and on appeal, the federal constitutional error had occurred when exculpatory evidence regarding another key witness in the case was withheld and not revealed to the defense. The trial court submitted Findings of Fact and Conclusions of Law overruling the second motion for new trial on October 26, 1983, and the petitioner filed his supplemental appellate brief in the Oklahoma Court of Criminal Appeals on December 19, 1983. The Oklahoma Court of Criminal Appeals

affirmed the petitioner's convictions on November 30, 1984. Bowen v. State, 55 O.B.J. 2521 (Okl.Cr. 1984). A motion for rehearing was subsequently denied on March 8, 1985, and an execution date was set for June 17, 1985. The petitioner filed a petition for writ of certiorari in the United States Supreme Court on May 6, 1985. Pending disposition of the petition for writ of certiorari by the Supreme Court of the Untied States, a motion to stay execution was filed in the Oklahoma Court of Criminal Appeals on May 6, 1985. Said motion to stay was denied on May 7, 1985, and a similar motion to stay execution filed in the United States Supreme Court on May 20, 1985 was granted on May 23, 1985 by Justice Byron White, pending disposition of the petition for writ of certiorari. In his petition for writ of certiorari, the petitioner claimed denial of due process under the federal constitution in the prosecution's

withholding of exculpatory evidence and a denial of effective assistance of counsel at both stages of his capital murder trial. The petition for writ of certiorari was denied by the United States Supreme Court on July 1, 1985. Following said denial, the Oklahoma Court of Criminal Appeals reset the petitioner's execution date for August 12, 1985. Pending ruling by this Court on the instant petition for writ of habeas corpus, the petitioner's execution date has been stayed pursuant to this Court's Order of July 26, 1985.

2. On July 6, 1980, at approximately 2 a.m., three men, Ray Peters, Marvin Nowlin and Lawrence Evans, were shot and killed by a .45 caliber pistol with silver tipped hollow point bullets while sitting in chairs around a table next to the swimming pool at the Guest House Motel in north Oklahoma City,

Oklahoma. Bullets were recovered at the scene but the pistol was not found.

3. A short time before the shooting Harold Behrens and Herman Borden, acquaintances of the deceased Ray Peters, had departed from the scene where they had been talking to the others present. As Behrens was leaving he placed his hand on Ray Peters' shoulder and said, "I'll see you tomorrow."

4. Four witnesses at the scene testified concerning seeing a man over a period of about one and one-half hours before the shooting at the concession machine area near the motel swimming pool.

Mary Lee Chilton, night manager of the Guest House Motel, testified she had noticed a man at the well lighted concession area for an hour and a half or more who wore a red baseball cap covering most of his forehead. He was between 50 and 60 years of age, about six feet in

height, 225 to 250 pounds with a pot belly, salt and pepper hair, wearing blue jeans with a medium blue long sleeved work shirt and work boots. His face was pale as though he had not been in the sun and he had a little bit of growth of facial hair. The subject wore no glasses. Mrs. Chilton paid particular attention to the man as she sat beside the pool because she knew he was not a registered guest in the motel. She walked within three feet of the subject as he was leaning on the candy machine, and she glanced quickly at his face. Mrs. Chilton identified the defendant, Clifford Henry Bowen, as the described man wearing the red baseball cap. Mary Chilton had undergone hynosis concerning her testimony but no timely record was made on the subject at trial.

Following the incident a few days, Mrs. Chilton identified from a photographic lineup one William Wayne Simmons

as the subject. Based on her identification a warrant was issued for Simmons' arrest but she then recanted her identification, when it was discovered in a lineup that Simmons was too short, approxiamtely 5'7" tall.

Carrie L. Pitchford, a guest at the Guest House Motel from California, described the subject at the well lighted concession area as she observed him minutes before the shooting while she looked out her motel window some 85 feet distant. She said he was very light-skinned, wearing a white T-shirt, blue jeans, and had on a red baseball cap. His face was very puffy and his hair was light, she was unable to determine the color. He was very large, at least 6 feet in height, and wore no glasses. Mrs. Pitchford identified the defendant, Clifford Henry Bowen, as the described subject she observed at the concession area.

Neither Mrs. Chilton nor Mrs. Pitchford saw the actual shooting of the three deceaseds, but each heard what they recognized as multiple gunshots.

Mrs. Chilton and Mrs. Pitchford, approximately a week later, identified the defendant from a photographic lineup and ultimately about three weeks later from a police live lineup.

These principal witnesses described the subject at the concession stand as a very pale white person. Neither the photographs (PX-1, Photograph Group No. 2, Photeo #3; DX-4 of nor an in person viewing of Clifford Henry Bowen results in one concluding that he is very pale. Clifford Henry Bowen's complexion is medium and capable of tanning when exposed to the sun.

Promud Govid, the Guest House Motel manager, and his wife, Bharti Govid, resided at the motel. When the shots were filed they looked out the motel

office window to the pool area about 100 to 150 feet away. Mr. Govid saw a man with a red baseball cap on standing near the candy machine. He looked tall and on the heavy side. Mr. Govid described how the man in the red baseball cap was shooting with his hand up. The subject then ran from the scene and a car was heard to speed away. Mrs. Govid testified she and her husband looked out the office window when they heard noise like firecrackers. Due to the darkness she did not see a person or how the person was dressed, but she did see someone's hand and gold sparks coming from the hand.

5. Sergeant David McBride of the Oklahoma City Police Department testified that in 1975 Harold Behrens was a police detective employed by the Oklahoma City Police Department. Both McBride and Behrens worked as investigators in the organized crime detail. In the months of

July through October 1975, as a result of information provided by an informant, undercover surveillance was being conducted by McBride and Behrens as well as others in the organized crime detail on two subjects, Jerry Ray James and the defendant, Clifford Henry Bowen. Surveillance of James and Bowen was carried out under cover at their respective apartments in Oklahoma City where each lived. Toward the latter stages of the investigation, Harold Behrens resigned from the Oklahoma City Police Department and shortly thereafter both James and Bowen moved out of their apartments and the surveillance ceased because their whereabouts were not known. As a result of this surveillance, Behrens knew who Bowen was.

When McBride heard the physical description of the Guest House Motel assailant, saw a composite drawing and knew of Harold Behrens' involvement, he

thought of Clifford Henry Bowen and pulled Bowen's picture from the police records bureau. McBride took the Bowen picture to the Oklahoma City police homicide supervisor and said he thought Bowen possibly a good suspect. Factors in the description that pointed McBride to Bowen were, "the salt and pepper hair. The big jaw, the pot belly. The horn-rimmed glasses. Several things that sounded exactly like him as I remembered him." (T.R. 386-387) The horned-rimmed glasses Clifford Henry Bowen normally wore are seen in DX-4, a photo of Bowen in the rodeo arena grand stand at Tyler, Texas taken a few weeks before July 6, 1980. An arrest warrant was issued for Clifford Henry Bowen concerning the triple slaying on August 27, 1980.

6. Jack Zumwalt, a homosexual lover of Harold Behrens, testified that he first Behrens him in 1976 when Behrens was running a private club in Oklahoma

City. Over the years following they lived together. Zumwalt testified Behrens earned his living by selling drugs such as marijuana, downers, acid and Dilaudid. Zumwalt testified he and Behrens were very close and that Zumwalt handled the money and Behrens handled the drugs, basically. Absent an appropriate objection Zumwalt further testified that it was not Behrens' custom to have physical contact with people upon parting company with them. Zumwalt testified that Ray Peters was an alcoholic and heavy user of Dilaudid. Raymond Peters sold drugs for Harold Behrens. In June 1980, Raymond Peters was arrested in Pauls Valley, Oklahoma, for DUI and drug charges. Harold Behrens received a telephone call and Behrens told Zumwalt that he needed to go to Pauls Valley and get Raymond Peters out of jail because he was concerned that Ray Peters was going to "snitch" on them concerning their drug

trafficking. Behrens did in fact go to Pauls Valley.

The day following the death of Raymond Peters, Zumwalt called Behrens advising he had read about the matter in the newspaper and asked Behrens about it. Behrens told him in that conversation that he did not have anything do to with it. Behrens admitted that he and Herman Borden had been present at the scene and stated that he could have been shot, too. A couple of days later Zumwalt talked with Behrens at Behrens' home and asked why was it Ray and not Jim Powell, another drug user and salesman of Behrens, and Behrens replied, "It was because he needed Jim."

Zumwalt testified that Herman Borden also lived with Harold Behrens and worked with Behrens in selling drugs. Zumwalt stated that Harold Behrens carried a .45 automatic pistol in his briefcase which he saw on a number of occasions and that

Behrens was an excellent shot. Zumwalt then identified the weapon which was described as an Echasa Eibar Spain caliber 7.65 model fast. Zumwalt had never heard Behrens mention the name of Clifford Henry Bowen.

7. The deceased, Lawrence Evans, was a guest at the Guest House Motel, a traveling roofer by trade, and had no previous social or business relationship with Peters and Nowlin.

8. The government argued that Raymond Peters was the principal victim of the triple slaying, carried out by Clifford Henry Bowen as a professional "hit man" having been procured by Harold Behrens, who also fingered the victim.

9. Harold Behrens wsa convicted of first-degree murder in a special jury trial on January 26, 1981 and was sentenced to life imprisonment on February 20, 1981. Behrens v. State, 699 P.2d 156 (Okl.Cr. 1985). Harold Behrens

did not testify at the jury trial of Clifford Henry Bowen but he did testify at the hearing on the second motion for new trial, September 29 and 30, 1983. Behrens testified he was not previously acquainted with Clifford Henry Bowen.

10. Clifford Henry Bowen's defense was that of alibi. Bowen produced twelve witnesses that testified on Saturday night, July 5, 1980, he was at a rodeo in Tyler, Texas, 300 miles distant, until approximately 12 midnight. One witness testified that he talked to Clifford Henry Bowen in Tyler, Texas by telephone about 1:00 a.m., Sunday, July 6, 1980, approximately 1 hour before the triple slaying. When Clifford Henry Bowen took the witness stand he testified he had been convicted of burglary in 1959 and of conspiracy in bank burglary in 1967 or 1968 for which he served a sentence in the federal penitentiary. The evidence established Bowen had no regular employ-

ment, occasionally sold jewelry, and essentially made his living as a gambler playing poker.

11. The State, as rebuttal evidence to the defendant's alibi defense, introduced expert evidence that a person could fly in a private jet from an abandoned air strip in Tyler, Texas a few miles from the rodeo arena, land at the Downtown Air Park in Oklahoma City, Oklahoma, and arrive by automobile at the Guest House Motel within approximately one hour. The defendant offered no surrebuttal evidence concerning the State's jet plan theory. At post-trial hearings the defendant (petitioner) did offer credible expert testiomny that neither the abandoned air strip in Tyler, Texas nor the Downtown Air Park in Oklahoma City, Oklahoma could accommodate any kind of jet aircraft during darkness. At the post-trial hearings there was evidence that other jet traffic authorized

airports were present in Tyler, Texas and Oklahoma City, Oklahoma but they would not fit in the assumed one hour travel time frame.

12. The evidence presented to the jury by the State, March 9 through 13, 1981, was adequate to permit the jury to determine if Clifford Henry Bowen was the actual perpetrator of the shooting of the three men at the Guest House Motel in Oklahoma City, Oklahoma on July 6, 1980, at approximately 2 a.m.[1]

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[1]Because of the strong alibi defense advanced by 12 witnesses, essentially ordinary citizens without previous criminal records, there was a vigorously contested issue of fact concerning the identification of the Guest House Motel assailant. In its Findings of Fact and Conclusions of Law following the second motion for new trial hearing (Finding of Fact No. 42, p. 8), the trial court characterized the evidence against Clifford Henry Bowen as "overwhelming." Depending on your viewpoint, such a characterization could be given to the petitioner's defense of alibi. The term "adequate" probably best characterizes the legal sufficiency of the government's evidence present at trial.

13. There was no written motion, either general or specific, for exculpatory evidence filed by or on behalf of the petitioner before or during the trial. At the hearing before the undersigned, it was conceded by the parties that approximately a month to six weeks before the jury trial, petitioner's counsel orally requested of the prosecutors (the District Attorney and his assistants assigned to the case) to be provided with the names of "all other suspects." The prosecutors advised that at the time of the request there was only one suspect and that was Clifford Henry Bowen.[2] On the day of trial, peti-

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[2]There was no concession or stipulation at any hearings before the trial court that an oral request was made by the defendant for "all other suspects" previous to the commencement of trial. Had such a stipulation been made, it would have required altering the trial court's Findings of Fact No. 28 and 41, which state that no such request for "all other suspects" was made by or on behalf of the defendant prior to trial.

tioner's counsel served a subpoena duces tecum on the Oklahoma City Police Department to produce its entire investigation file concerning the Guest House Motel murders. The information hereafter discussed concerning Leonard Lee Crowe was not produced by the Oklahoma City Police Department pursuant to the subpoena duces tecum.

14. From a period of August 1980 until the trial in March 1981, the following information concerning the suspect Leonard Lee Crowe was contained in reports in the file of the Oklahoma City Police Department and was known to assistant prosecutors in the office of the District Attorney for Oklahoma County. The office of the District Attorney maintains what is referred to as a "black book" in each prosecution which contains all relevant investigative reports and information for trial. The District Attorney for Oklahoma County

testified that he personally was not aware of the suspect Leonard Lee Crowe information before or during the trial of Clifford Henry Bowen but his assistants associated in the prosecution were. Assistant Prosecutor Hardwick testified that he thought he and the District Attorney discussed the suspect Leonard Lee Crowe in reference to preparation for trial of the Harold Behrens case in January 1981. (Deft. Exhibit 1A, the "black book", was not previously made available to petitioner until the federal hearing on October 17, 1985).

In August 1980, the month following the triple slaying at the Guest House Motel, the following information concerning the suspect Leonard Lee Crowe was documented in the prosecution's file:

A. That one of the primary initial suspects was named Leonard Lee Crowe and he matched the description of a white male, 6'2" tall, 225 pounds, salt and

pepper hair, beer gut, occasionally wearing a baseball cap, with a very pale face, no mustache, no eyeglasses and who carried a .45 claiber pistol with silver tipped hollow point ammunition.

B. That Leonard Lee Crowe had lived in North Charleston, South Carolina prior to the shootings.

C. That Leonard Lee Crowe had taken vacation leave from the Hanahan, South Carolina, police department where he was a lieutenant beginning July 1, 1980, and had personally applied for a police position at the Irving, Texas, police department a matter of a few days before the Guest House Motel shootings.

D. That Leonard Lee Crowe had a photograph taken at the Irving, Texas police department, previous to the shootings, showing that he had a dark mustache. That when Leonard Lee Crowe returned to Hanahan, South Carolina on

about July 8, 1980, he no longer had the mustache.

E. That Leonard Lee Crowe had been living in South Carolina with Patsy Peters, the ex-wife of the victim, Ray Peters.

F. That when Patsy Peters was younger she had met Raymond Peters, who was much older than she was, and that Raymond Peters never actually married her but transported her to South Carolina, where she became a prostitute.*

G. That approximately a week or two before his death, Raymond Peters made a telephone call to Patsy Peters during which Ray told Patsy not to come to Oklahoma City, because he did not want to see her. Ray told Patsy that he just

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*The asterick represents information that was contained in Defendant's Exhibit 1A at the federal hearing which was not previously made known to the petitioner or the trial court.

wanted to see his two children. Ray threatened Patsy and told her that if she came to Oklahoma City to see him, he would contact Patsy's parents and tell them what she really was and then hung up on her. This telephone call was made from the residence of Mrs. Margraves, the mother of Ray Peters.*

H. That Patsy Peters came to Oklahoma City with her two children and went to Mrs. Margraves' residence. Patsy arrived with a white male in his late 40s, approximately 6'2" tall, 225 pounds, and having salt and pepper hair, and wearing some type of cap. Mrs. Margraves thought it was strange that this person was never introduced to anyone. Patsy and this person were at Mrs. Margraves' residence a few days before Raymond Peters was killed. Raymond Peters' oldest son saw Raymond slap Patsy outside the house during this visit. The person

with Patsy was not present outside the house when Raymond slapped Patsy.*

I. That Patsy Peters was engaged to Leonard Lee Crowe.*

J. That Patsy Peters and Leonard Lee Crowe came to Oklahoma together in the first week of July 1980 and were temporarily staying at the home of the Forgusons, Mrs. Peters' parents, in Mannsville, Oklahoma, just prior to and during the time of the shootings. Mannsville, Oklahoma is just north of Madill, Oklahoma, approximately 130 miles from Oklahoma City, Oklahoma.

K. That officers of the Oklahoma City police department interviewed Mrs. Forguson, the mother of Patsy Peters. Mrs. Forguson told the police that she was in Oklahoma City at a religious convention on July 5 and 6, 1980, and believed that Leonard Lee Crowe had stayed at her home with Patsy Peters and her husband in Mannsville, Oklahoma.

That Mrs. Forguson said that Patsy and Lee Crowe left Patsy's two children in Mannsville and had gone back to South Carolina early Sunday morning, July 6, 1980.

M. That Mrs. Forguson has never liked Raymond Peters because of the way he had treated Patsy when they were married. While talking to the police Mrs. Forguson appeared extremely nervous and uncomfortable.*

N. That Leonard Lee Crowe left Oklahoma on July 6, 1980 and returned to work at the Hanahan, South Carolina police department. That shortly after Leonard Lee Crowe returned to South Carolina after the shootings, he resigned from the Hanahan police department. Leonard Lee Crowe was requested to leave the Hanahan police department or he would be fired because of his involvement with known prostitutes and felons.*

O. That the Oklahoma City police department considered suspicious the nature of the events occuring around Patsy Peters and her departure from Madill, Oklahoma, after the homicide of Raymond Peters.

P. That Leonard Lee Crowe had been employed in the Sheriff's Department in Charleston, South Carolina, but had been fired a few years before 1980*.

Q. That Leonard Lee Crowe had been under investigation by South Carolina law enforcement agents for the past year on suspicion of being a hit man. There had been several occasions wherein Crowe would leave the state of South Carolina and upon returning it was discovered that wherever he had been there had been a homicide.*

R. That Leonard Lee Crowe had an extremely high temper and it was the belief of the South Carolina law

enforcement agents that Crowe is capable of killing anyone for money.*

S. That an incident was related to the Oklahoma City police in which Leonard Lee Crowe's ex-girlfriend had a boyfriend who kept bothing her and the boyfriend was later found with five bullet holes in his head. The weapon that was used was a small caliber pistol and upon contacting Leonard Lee Crowe and asking him where his pistol was, he advised that he had lost it.

T. That the South Carolina authorities had furnished finger print data and a photograph of Leonard Lee Crowe in his police lieutenant's uniform and spent casings from his .45 caliber pistol requalification to the Oklahoma City police department. That the finger prints and the ballistics evidence did not match the murder scene evidence.

15. That Leonard Lee Crowe was eliminated as a suspect primarily because

of the identification of Clifford Henry Bowen by the witnesses Chilton and Pitchford, the "confirmed" alibi for Leonard Lee Crowe provided by Mrs. Forguson, and the negative ballistics results. It was conceded by the prosecution in post-trial hearings that there had been no confirmed alibi for Leonard Lee Crowe previous to the conviction of Clifford Henry Bowen, because Mrs. Forguson was not present in Mannsville, Oklahoma, on July 5 or 6, 1980, to confirm the whereabouts of Leonard Lee Crowe at the time of the shootings.

16. Defendant's Exhibit 1 at the second motion for new trial hearing before the trial court on September 29 and 30, 1983 was a report from Officer Dean Powell of the South Carolina law enforcement division which stated in pertinent part as follows:

> "On July 24, 1980, at about 10:00 a.m., Chief John F. Conroy called this agent requesting he come to

Charleston Police Department referenced a phone call he received this date reference a triple murder in Oklahoma City, Oklahoma.

"At about 11:00 a.m., this agent along with Chief Jim Goss and S/A Caldwell went to Chief J. F. Conroy's office and read some notes he had taken during a phone call from Detective Bob Horn of Oklahoma City Police Department. A phone call was made to Detective Horn in Oklahoma City, 405-5300, Homicide Division, who related the following regarding a triple murder which occurred on July 6, 1980, 2:00 a.m., Oklahoma City, Oklahoma.

"On July 6, 1980, at about 2:00 a.m., a white male, late 30's, 6-2, 225, salt and pepper hair, beer gut, wearing blue baseball cap, blue shirt and jeans walked up behind the three victims while they sat around at able by the pool of Guest House Inn, 5200 North Claussen (sic) Street, Oklahoma City, Oklahoma. This white male shot and killed all three shooting Peters first, then Nowlin, and then Evans. They were all shot with 45 caliber automatic, W-W brand ammo, silver tipped hollow point. Victim Peters is or was a known drug dealer in Oklahoma City area along with suspect Harold Behrens. He was also involved with Ricky Seagraves in the Charleston area, dealing dilaudid. It is reported that Peters and Seagraves was supposed to have ripped off Paul Mazzell in a dilaudid deal in 1978. Ricky Seagraves disappeared on or about October 1978, when he was

kidnapped from a Magic Market type store on Highway 78. Seagraves has never been heard of since. CI's of this agent report that Danny Hogg and Eddie Merman were the persons who kidnapped Seagraves and killed him for Paul Mazzell. Detective Horn had the same information from his CI's in Oklahoma City regarding Seagraves.

"Detective Horn further stated that they knew one Lee Crowe had been in Oklahoma City on the date of the triple murders and that Crowe carried a 45 caliber automatic. Detective Horn wanted a description of Lee Crowe, which we gave him. Detective Horn was informed that this agent and S/A Caldwell were coming out that way July 25, 1980 or July 26, 1980. Detective Horn requested that we bring pictures and any information regarding Lee Crowe.

"This agent and S/A Caldwell obtained a picture and fingerprint card of Lee Crowe from Chief Jim Goss.

"We also learned from Chief Goss that Lee Crowe had take a week of annual leave and was in Oklahoma City area when the murders occurred.

July 27, 1980 10:00 a.m. - 4:00 p.m.

"This agent and S/A Caldwell met with Detective Horn and Harrison of Oklahoma City Police Department and went over the case reference the triple murders. We supplied

picture and fingerprint cards of Lee Crowe to above officers. Detective Horn informed us that they had a witness who saw the murder but she didn't say anything about a mustache which pictures of Crowe showed. We contacted Chief Goss who informed us that Lee Crowe left on leave with a mustache and when he returned off leave, he didn't have one.

"We also learned that Lee Crowe was going with Patsy Peters, wife of victim Ray Peters and that Crowe and Peters were planning to get married. We also learned that Ray Peters used to live in Charleston, Box 381, Johns Island, SC.

July 28, 1980 11:30 a.m.

"This agent and S/A Caldwell interviewed CI of Detective Thompson, Oklahoma City Police Department who stated that Peters and Seagraves were killed because they ripped off Paul Mazzell. And that the hit man came from Charleston, South Carolina. CI further stated that Seagraves was killed by Hogg and Merman for Paul Mazzell.

"Paul Mazzell was getting his dilaudid from Seagraves, Peters and Behrens through a source in Oklahoma City, Oklahoma. And that Behrens had just left Peters and the other two victims when the hit man arrived and killed them. CI is concerned because he knows too much. This agent considers information very reliable because of such details regarding Charleston drug activity and Mazzell group.

"Miscellaneous information

"This information gathered by this agent in Charleston area, Lee Crowe very close to Danny Hogg and has been observed at Hogg's apartment prior to and after his leaving Hanahan Police Department. It is suspected that there is a connection between Crowe and a girl named Giana Delson who is a working girl in the Hanahan area.

"At this stage of the investigation, Lee Crowe is a prime suspect in the triple murders in Oklahoma City. We are awaiting word on ID by witness."

The evidence reflected the confidential informant (C.I.) referred to in Office M. D. Powell's report was Harold Behrens. While the written report of Special Agent Powell of South Carolina law enforcement was not in the file of the District Attorney of Oklahoma County, it is corroborative of information therein.

17. At the second motion for new trial hearing a female named Deana Burris testified on behalf of the petitioner herein, as newly discovered evidence. She testified that in June of 1980, she

was living in an apartment in Hanahan, South Carolina with Leonard Lee Crowe and Patsy Peters. Patsy Peters was Leonard Lee Crowe's girlfriend. On a previous occasion Deana Burris stated she and Leonard Lee Crowe had had sexual intercourse. Deana Burris was acquainted with Raymond Peters and the children of him and Patsy Peters.

Deana Burris testified that in June of 1980, she heard Leonard Lee Crowe and Patsy Peters discussing Leonard Lee Crowe killing Raymond Peters because Patsy Peters did not want Raymond Peters to have anything to do with their children. The discussion went on for two or three nights. Shortly thereafter Leonard Lee Crowe and Patsy Peters moved out of the apartment and traveled to Oklahoma. Following Raymond Peters' death, Patsy Peters called Denana Burris a few times and inquired if anyone had been asking questions about Leonard Lee Crowe. Patsy

Peters told her to be quite and let her know if there were any inquiries about Leonard Lee Crowe.

Deana Burris first related the above to Officer James Chadwick Caldwell of South Carolina law enforcement in November 1981 in Officer Caldwell's investigation of the South Carolina murder of one Ricky Seagraves. In November 1981 Officer Caldwell was not aware of the status of the case in Oklahoma City concerning the Raymond Peters shooting. Officer Caldwell stated he placed little credence in the Deana Burris information in November 1981, because he knew her to be a prostitute and though she was on drugs at the time. However, again in April 1983, Officer Caldwell re-interviewed Deana Burris, after learning of the Guest House murder convictions and Deana Burris repeated the same information to him. On the second occasion Officer Caldwell thought Deana

Burris credible because she was off drugs then and appeared convincing. Officer Caldwell then made the Deana Burris information available to the Oklahoma authorities (The Deana Burris information could not be considered exculpatory under Brady v. Maryland, infra, because it was not known to the prosecution until 1983, long after the trial of Clifford Henry Bowen in March 1981. The trial court found the information presented by Deana Burris was not newly discovered evidence sufficient to justify the granting of a new trial because it perhaps could have been discovered by due diligence by the defense, and further that Ms. Burris was not a credible witness).

While the Deana Burris information could be said to be neither exculpatory under Brady v. Maryland, infra, nor newly discovered evidence requiring a new trial, it does serve to dramatize and

accentuate the materiality of the Leonard Lee Crowe suspect information.

18. The photograph of Leonard Lee Crowe utilized in the photograph lineup displayed to Mrs. Chilton and Mrs. Pitchford showing his bald head, with no cap, and in the photograph Leonard Lee Crowe had a heavy black mustache. The photograph of Leonard Lee Crowe utilized in the photographic lineup was provided by the Irving, Texas police department.

19. The Leonard Lee Crowe information contained in the State's file would not all be admissible in evidence at the trial of Clifford Henry Bowen but relevant parts thereof would be admissible in evidence, such as in the photo identification lineup cross-examination of witnesses Chilton, Pitchford and Officer Harrison, as well as in cross-examination of Officer Cook and perhaps examination of other Oklahoma city police officers concerning the scope of the

investigation relative to other suspects. Timely receipt of the Leonard Lee Crowe information may have led to other relevant evidence or witnesses.

20. The Court concludes that the evidence in the file of the State of Oklahoma about Leonard Lee Crowe was material; that it "creates a reasonable doubt that did not otherwise exist", U.S. v. Agurs, infra) and that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (U.S. v. Bagley, infra) The prosecutors had the duty to disclose the Leonard Lee Crowe information, even in the absence of the specific oral request made by petitioner's counsel.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and the subject matter herein under 28 U.S.C. § 2254.

2. Any Finding of Fact abouve which could also properly be characterized a Conclusion of Law is incorporated herein.

13. In Brady v. Maryland, 373 U.S. 83, 87-88, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963), the Supreme Court stated that:

> "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.
>
> "* * * Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. an inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.' A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not

> "the result of guile,' to use the words of the Court of Appeals. 226 Md., at 427, 174 A.2d, at 169."

The three elements of a Brady violation are "(a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence." Moore v. Illinois, 408 U.S. 786, 794-95, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706 (1972).

4. The disclosure required by Brady v. Maryland, supra, is not a rule of discovery. United States v. Agurs, 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Rather, it is a rule of fairness and the constitutionally minimal prosecutorial obligation.

5. Concerning the question of materiality of evidence in the prosecutor's control, the court in Chaney v. Brown, 730 F.2d 1334, 1339-40 (10th Cir. 1984) stated:

> "The question of the materiality of evidence in the prosecutor's control arises in 'three quite different situations.' Agurs, 427 U.S. at 103, 96 S.Ct. at 2397. First, where the prosecutor has knowingly used perjured testimony, the judgment must be set aside 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.' Id. at 103-04, 96 S.Ct. at 2397. Second, where defendant has made a specific pretrial request for exculpatory evidence, the judgment must be set aside if 'the suppressed evidence might have affected the outcome of the trial.' Id. at 104, 96 S.Ct. at 2397 (emphasis added); see id. at 104-06, 96 S.Ct. at 2397-98. Third, where defendant has made 'a general request for Brady material,' or has made no request at all, the judgment must be set aside 'if the omitted evidence creates a reasonable doubt that did not otherwise exist.' Id. at 112, 96 S.Ct. at 2401 (emphasis added); see id. at 104-14, 96 S.Ct. at 2398-02."

The second and third situations in the quoted language are involved in the analysis herein.

6. In United States v. Jackson, 579 F.2d 553 (10th Cir. 1978), the court discussed the prosecution's obligation under Brady when only a general Brady

request has been made. In Jackson it is stated:

> "The constitution does not demand complete disclosure of the prosecutor's files. The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."

United States v. Jackson, supra, 579 F.2d at 560. The court also recognized that under Agurs the burden is on the defendant to establish the failure to disclose was violative of his due process rights.

The standard for materiality when a general request for Brady information has been made is:

> "[U]nless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose... But to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial."

U.S. v. Agurs, supra, 427 U.S. at 108.

7. In the recent case of United States v. Bagley, ___ U.S. ___, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), the Supreme Court has provided the most current analysis concerning materiality and the Brady exculpatory evidence disclosure requirement. Therein it is stated:

> "The Court has relied on and reformulated the Agurs standard for the materiality of undisclosed evidence in two subsequent cases arising outside the Brady context. In neither case did the Court's discussion of the Agurs standard distinguish among the three situations described in Agurs. In United States v. Valenzuela-Bernal, 458 U.S. 858, 874 (1982), the Court held that due process is violated when testimony is made unavailable to the defense by Government deportation of witnesses 'only if there is a reasonable likelihood that the testimony would have affected the judgment of the trier of fact.' And in Strickland v. Washington, ___ U.S. ___ (1984), the Court held that a new trial must be granted when evidence is not introduced because of the incompetence of counsel only if 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' Id. at ___ (slip op. 24). The Strickland

> Court defined a 'reasonable probability' as 'a probability sufficient to undermine confidence in the outcome.' Ibid.
>
> "We find the Strickland formulation of the Agurs test for materiality sufficiently flexible to cover the 'no request,' 'general request,' and 'specific request' cases of prosecutorial failure to disclose evidence favorable to the accused: The evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."

Bagley, supra at 3383-84.

The Court's findings herein are such that the Leonard Lee Crowe evidence satisfies both the Agurs and Bagley standard concerning materiality which requires no exculpatory evidence request. The retroactive application of Bagley is therefore moot.

8. In pertinent part, 28 U.S.C. § 2254(d) provides that in a federal habeas corpus proceeding,

> "a determination after a hearing on the merits of a factual issue, made by a State Court of competent jurisdiction ... shall be presumed to be correct,"

unless any of eight exceptions applies. As was stated in Chaney v. Brown, 730 F.2d 1334, 1346:

> "*** The §2254(d) presumption of correctness does not apply to legal questions or mixed questions of law and fact such as whether the nondisclosure of evidence here might have affected the guilt or punishment decisions and thus infringed Chaney's due process rights; the presumption applies only to 'basic, primary or historical facts.' Cuyler v. Sullivan, 446 U.S. 335, 341-42, 100 S.Ct. 1708, 1714, 64 L.Ed.2d 333 (1980). See also Marshall v. Lonberger, 459 U.S. 422, 431, 103 S.Ct. 843, 849, 74 L.Ed.2d 646 (1983); Sumner v. Mata, 455 U.S. 591, 597 & n.10, 102 S.Ct. 1303, 1307 & n. 10, 71 L.Ed.2d 480 (1982); Griffin v. Winans, 684 F.2d 686, 688-89 (10th Cir. 1982); Hunt v. Oklahoma, 683 F.2d 1305, 1309 (10th Cir. 1982)."

9. The conceded timely oral request for "all other suspects" should be considered a specific request under the Agurs analysis and thereby meet the test that the suppressed evidence might have

affected the outcome of the trial. The evidence available to the prosecutor concerning Leonard Lee Crowe might have affected the outcome of the trial. The respondent urges that such requests to be legally cognizable should be of record. The obvious reason for the requirement of a record of a request for exculpatory evidence is to formally document the request, and avoid a waiver in the situations where the prosecutor does not otherwise have the duty of disclosure. An unrecorded oral request may give rise to a later dispute whcih will probably be resolved in favor of the nonrequesting party. Herein, however, we have a timely oral request by a defendant (petitioner) for the names of "all other suspects" and there is no dispute that the oral request was made. There is a dispute concerning specifically what "other suspects information was provided to the defendant by the State before trial, but it is

undisputed that information about the suspect Leonard Lee Crowe was not provided.

To avoid the vagaries of an oral off-the-record request for exculpatory evidence, such request should always be of record. However, when a specific timely oral request is made for "all other suspects", and there is no dispute that the request was made, and particularly in a capital case, the prosecutor should disclose the reasonably viable other suspect information within the prosecutors' control.

The petitioner's reliance on United States v. Montoya, 716 F.2d 1340 (10th Cir. 1983) as authority supporting an oral request for exculpatory information is misplaced because such request was actually made on the record as distinguished from the instant matter.

The respondent urges that the case of Moore v. Illinois, 408 U.S. 786, 92 S.Ct.

2526, 33 L.Ed.2d 706 (1972) "presents an almost identical factual situation." significant differences in Moore and the instant case are that in Moore there was evidence that the defendant admitted the shooting of the Lansing, Illinois bartender, and the fact that the other suspect who had stated that he shot a bartender in Lansing, Illinois was never actually found in the subsequent investigation.

10. The Court concludes the timely, undisputed oral request for "all other suspects" was a specific request and that the suppressed evidence in the control of the Oklahoma County prosecutor concerning the suspect Leonard Lee Crowe might have affected the outcome of the trial. Further, in the absence of a specific request for all other suspects, the Court concludes the Leonard Lee Crowe evidence under the control of the State was such that the prosecutor had a duty to make

disclosure thereof to the defense as being material, because there was a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different, and that it created a reasonable doubt that did not otherwise exist. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); United States v. Bagley, ___ U.S. ___, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); Lindsey v. King, 769 F.2d 1034 (5th Cir. 1985).

11. The issue of the belated information and post-trial testimony of Deana Burris and its character as newly discovered evidence is not before the Court. When newly discovered evidence is being urged the defendant has the severe burden of demonstrating that the newly discovered evidence probably would have

resulted in an acquittal. F.R.Crim.P. 33; Ashe v. United States, 288 F.2d 725, 733 (6th Cir. 1961); United States v. Thompson, 493 F.2d 305, 310 (9th Cir. 1974) cert. denied, 419 U.S. 834; United States v. Houle, 490 F.2d 167, 170 (2nd Cir. 1973) cert. denied, 417 U.S. 970; United States v. Meyers, 484 F.2d 113, 116 (3d Cir. 1973); Heald v. United States, 175 F.2d 878, 883 (10th Cir. 1949). See also, 2 C. Wright, Federal Practice & Procedure, § 557 (1969).

12. The convictions of Clifford Henry Bowen of the three counts of murder of Raymond Peters, Marvin Nowlin and Lawrence Evans are hereby set aside.

13. For the reasons expressed herein, it is not necessary to consider the ineffective assistance of counsel issue asserted by petitioner.

14. In keeping with the Findings of Fact and Conclusions of Law expressed herein, a separate order and judgment

will be entered this date by the Court sustaining the petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, and that the defendant be directed therein to forthwith release the petitioner of restraints on his liberty and release him from custody.

15. The state may retry the petitioner for the July 6, 1980 murders of Raymond Peters, Marvin Nowlin and Lawrence Evans consistent with the views expressed herein.

DATED this 22nd day of January, 1986.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
OCT 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-485

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

GARY MAYNARD, WARDEN,
Petitioner,

v.

CLIFFORD HENRY BOWEN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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THE QUESTIONS PRESENTED FOR REVIEW

I. Should this Court grant Certiorari to review the determination by the Court of Appeals that the intentionally withheld evidence regarding the suspect Lee Crowe was exculpatory?

II. Should this Court grant Certiorari to review the determination by the Court of Appeals that the federal district court comported with the requirements of 28 U.S.C. § 2254(d) and was correct in finding as fact that there had been a specific request by the defense for exculpatory evidence?

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NO. 86-485

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

GARY MAYNARD, WARDEN,
Petitioner,

v.

CLIFFORD HENRY BOWEN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The Respondent, Clifford Henry Bowen, respectfully prays that this Honorable Court deny the Petition for a Writ of Certiorari. The parties will be referred to as "the State" (Petitioner in this Court) and "Mr. Bowen" (Respondent in this Court).

CITATIONS TO OPINIONS BELOW

Since the Petition for a Writ of Certiorari was filed, the decision of the United States Court of Appeals for the Tenth Circuit has been published as *Bowen v. Maynard,* 799 F.2d 593 (10th Cir. 1986). It should be noted that a review of the appendices to the Petition indicates that the opinions of the Court of Appeals and the District Court are in reverse order from that listed at page two of the Petition.

Most importantly, the opinion of the Court of Appeals contained an appendix setting out the actual investigation report containing the withheld exculpatory evidence. The Petitioner omitted this in his Appendix A to the Petition. The copy he later sent is very hard to read. Therefore, a printed copy is included as Appendix A to this Brief in Opposition.

STATEMENT OF THE CASE

The Respondent agrees with the Petitioner's Statement of the Case except for the following errors:

1. The Petitioner seeks review by writ of certiorari, and not by appeal, as is stated at page five of the Petition, and

2. The granting of the writ of habeas corpus by the United States District Court for the Western District of Oklahoma was affirmed upon the state's appeal by the United States Court of Appeals for the Tenth Circuit, and not by the United States District Court for the Tenth Circuit, as stated at page six of the Petition.

CONCISE STATEMENT OF FACTS

Because this case involves a factually innocent successful federal habeas petitioner, the facts are summarized according to hearings in the fact-finding courts below.

1. At trial, March 9-13, 1981

On July 5, 1980, Mr. Bowen attended a special holiday rodeo in Tyler, Texas. Twelve witnesses testified that he was at the rodeo until approximately midnight. Further, Johnny Wheeler testified that he attended the rodeo with Mr. Bowen, and called Mr. Bowen's home in Tyler and personally spoke to Mr. Bowen on the telephone after 1:00 a.m. on July 6, 1980. (Tr. 467-531).[1]

Less than one hour later on July 6, 1980, three hundred miles away at the Guest House Inn in Oklahoma City, Oklahoma, three men were shot with a .45 caliber pistol. (Tr. 208). No witness could identify the shooter. The State's case relied on two witnesses who identified Mr. Bowen as the individual who was near the scene prior to the shootings. Mary Chilton, a clerk at the motel, said she observed a man, whom she identified as Mr. Bowen, at about 12:15 a.m. standing near the concession area. The man remained for approximately two hours. He had salt and pepper hair, and was wearing a red baseball cap, a medium blue long-sleeve shirt, blue jeans, and a pair of work boots. (Tr. 293). He did not wear glasses, and his face was almost a white, whitish gray. (Tr. 317). She did not see the shooting. Prior to trial, she had previously identifed William Wayne Simmons as the per-

1. All references to the record at trial and the hearing on the first motion for new trial are to the trial transcript, which is consecutively numbered.

son at the scene. (Tr. 319-321). In fact, Detective Bill Harrison swore in an affidavit that "Mrs. Chilton positively identified William Wayne Simmons. . . ." (Tr. 563). Carrie Pitchford, a motel guest, said she returned to her room about 1:15 a.m. to 1:30 a.m., and looked out her window to see a large man near the concession area wearing a very white t-shirt, bright red cap, and jeans. (Tr. 334-335). His face was very, very white. She identified this man as Mr. Bowen. (Tr. 335). She did not see the shooting. The manager of the motel said he saw a man with a red ball cap near the candy machine shortly after midnight, but could not describe him. (Tr. 359). Later, he saw someone with a red cap shooting, but could not describe the man or his clothes. (Tr. 360-361). Four other witnesses testified that Mr. Bowen had a deep suntan on July 5, 1980. (Tr. 458, 477, 495, 527).

The State introduced rebuttal testimony that a small executive jet could fly from Tyler, Texas to Oklahoma City, Oklahoma in thirty to thirty-five minutes, and could land at a downtown airstrip, that was thirteen minutes by car from the motel. (Tr. 577-584). No evidence was introduced that any such flight occurred on July 5 or 6, 1980.

2. Hearing on First Motion for New Trial, April 29, 1981

Two expert witnesses testified that it was an absolute impossibility for a jet airplane to fly from Tyler to the downtown Oklahoma City airpark due to the length of the airstrip, its location, airplane characteristics, and safety considerations. (Tr. 815-819). This was confirmed by the manager of the airpark, who testified that he was unaware

of any night landing by a jet at his unlighted, non-controlled airfield in the thirty-three years he had been there. (Tr. 831).

3. Hearing on Second Motion for New Trial, September 29-30, 1983

At this state evidentiary hearing, it was stipulated that all of the following evidence was withheld from the defense prior to trial. (Tr. 299)[2]:

In July 1980, in connection with the investigation of the shootings in question, two detectives with the Oklahoma City police department went to Madill, Oklahoma to interview Mrs. Margraves, the mother of Raymond Peters, one of the victims. (Tr. 126). Mrs. Margraves informed the detectives that Patsy, one of Raymond's ex-wives, had come from South Carolina and had been in the Madill area at about the time of the murders. (Tr. 127). Patsy then had a man with her, and Mrs. Margraves was suspicious of the man because Patsy would not introduce him to anyone. (Tr. 127-128). Mrs. Margraves described the man as 6′2″, 225 pounds, salt and pepper hair, and wearing some type of cap. This fit the description of the person given by the scene witnesses. (Tr. 128).

The detectives then went to a farm between Russett and Mannsville, Oklahoma. There they interviewed Jimmy Forguson, brother of Patsy Peters, and Margie Forguson, mother of Patsy Peters. (Tr. 128). The detectives learned that the man with Patsy was Lee Crowe. (Tr. 129). According to Mrs. Forguson, she and Patsy went

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2. All references to the record at this hearing are to the separate transcript from the hearing on the Second Motion for New Trial.

to a revival meeting in Oklahoma City on the night of the killings. (Tr. 166, 274). Mrs. Forguson believed that Lee Crowe was at home with her husband that night. (Tr. 166). However, no one talked to Mr. Forguson in an effort to confirm this until the summer of 1983. (Tr. 167). To this date, no one has stated under oath that he was with Crowe on that night. (Tr. 170).

Shortly after interviewing these witnesses, the detectives learned that Lee Crowe had applied to be a police officer in Irving, Texas. The detectives traveled to Irving and obtained a photograph of Lee Crowe. (Tr. 282). Detective Horn believes that this trip occurred on July 23, 1980. (Tr. 282).

On July 24, the Oklahoma detectives contacted South Carolina authorities for the purpose of obtaining more information about Lee Crowe. (Tr. 16). The Oklahoma detectives described the suspect to South Carolina authorities as 6'3", 230 pounds, salt and pepper hair, beer gut, jeans, and wearing a baseball hat. (Tr. 18). When the description was completed, the South Carolina authorities immediately identified the suspect as Lee Crowe. (Tr. 269). The South Carolina authorities also confirmed that Crowe had been living with Patsy Peters (Tr. 21, 219), was in his late thirties, (the same age as the suspect) (Tr. 20), commonly used a .45 caliber weapon, (the type of weapon used in the killings) (Tr. 19), commonly used very expensive silver-tipped bullets as used in the killings (Tr. 49, 252), and had traveled to Oklahoma shortly before the killings. (Tr. 23). South Carolina authorities provided a picture and fingerprint card for Lee Crowe. (Tr. 17). They later mailed shell casings from Crowe's police service pistol. (Tr. 29).

On about the same day, a photo spread was shown to Mary Chilton, one of the scene witnesses. (Tr. 133). The witness picked Mr. Bowen, not Crowe, out of the photo spread. (Tr. 133). However, the photograph used in the photo spread showed Crowe with a moustache. (Tr. 157). The man at the scene had no moustache. (Tr. 291). The Oklahoma detectives were aware that Lee Crowe had shaved his moustache at approximately the time of the killings. (Tr. 297). The witness picked Mr. Bowen out of the line-up despite the earlier description of the man at the scene as in his late thirties. (Tr. 158). Furthermore, contrary to the earlier description, Mr. Bowen's face does not appear white in the photo spread. (Tr. 159). Crowe definitely appears more pale than Mr. Bowen in the photo spread. (Tr. 160). The same photo spread was sent to California and viewed by Mrs. Pitchford, the other scene witness. (Tr. 135). She also picked Mr. Bowen out of the same spread (SX-3). Despite the witnesses' identification of Mr. Bowen, the detectives caused the arrest warrant for the murders to be issued in the name of John Doe. (Tr. 156).

On July 28, 1980, the Oklahoma police received information from a confidential informant that Peters was killed because he had "ripped off" Paul Mazzell, and the hit man had come from Charleston, South Carolina. (Tr. 174). Lee Crowe was from Charleston, South Carolina.

Mr. Macy, the District Attorney, testified that his office was aware of the investigation of Lee Crowe. (Tr. 108). He testified that this information was not given to defense counsel for three reasons: the scene witnesses did not pick Crowe out of the photo spread (Tr. 111); Crowe had an alibi (Tr. 112); and Crowe's bullet cas-

ings did not match those found at the scene. (Tr. 112). In reality, the alibi was unconfirmed (Tr. 293), and the scene bullet casings were not connected in any way to Mr. Bowen either. (Tr. 295). Mr. Hardwicke, an Assistant District Attorney who assisted at trial, admitted that when a defense of alibi is involved, identity is the key issue. (Tr. 223). He further admitted that if there was evidence that Lee Crowe matched the description of the shooter, had motive to commit the murder, had the opportunity because he was in Oklahoma, habitually used a weapon of the same caliber as that used in the murder, and had no alibi, this would be exculpatory evidence because it would impeach the eyewitnesses. (Tr. 224).

4. Hearing on the Federal Writ of Habeas Corpus, October 15-17, 1985

In his Motion for an Evidentiary Hearing, Mr. Bowen urged that under 28 U.S.C. § 2254(d), unresolved factual disputes remained on the issue of the withholding of exculpatory evidence; that some facts were not fully and fairly developed in the state court; and that certain factual determinations by the state court were not fairly supported by the record.

Most of the hearing before Judge Brett was concerning the issue of ineffective assistance of counsel. One of the principal omissions alleged was that no formal written *Brady* motion was filed, since the State had relied on that undisputed fact throughout post-trial proceedings. Therefore, both trial defense lawyers and the trial prosecutor testified regarding the existence, nature, or lack of exculpatory evidence, from their perspectives, so that the Court could determine if the error was such that a

reasonable probability existed that a different result would have been reached under *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).

Frank Wright, the lawyer hired as lead defense counsel, testified he had orally asked the prosecutors for the names of other suspects on several occasions, beginning in January 1981, and that he was told none existed. (Vol. I., p. 114).[3] Robert Macy, the prosecutor, testified that, if the transcript from the hearing on the First Motion for New Trial revealed that he argued to Judge Naifeh that he had discussed the subject of other suspects with Mr. Burger, the transcript would be correct. (Vol. III., p. 22). He also testified that, if the eyewitnesses were impeached, there was a reasonable probability that a not guilty verdict would have been reached. (Vol. III., p. 68).

The State produced, pursuant to federal subpoena, the State report of investigation ("Black Book"), attached hereto as Appendix A. This was not revealed prior to this hearing. In summary form, it disclosed that a week or two prior to the killings, the primary victim, Raymond Peters, had telephoned his ex-wife Patsy and made threats to her from the home of Peters' mother; that Ray had slapped Patsy when she came to the home of Ray's mother just prior to the killings; that Patsy Peters was engaged to Crowe; that Patsy and Crowe had left Oklahoma early on July 6, 1980, the morning that the shootings occurred at 2:00 a.m.; that Crowe had left South Carolina on vacation July 1, 1980; that Crowe had been under investigation as a hit man for the past year; that Crowe had an extremely high temper and was capable of killing

3. All references to the record at this hearing are to the volume and page of the transcripts from the federal hearing which are not consecutively numbered.

anyone for money; that he had previously been suspected of killing the boyfriend of one of his ex-girlfriends; and that Ray Peters had been subpoenaed to testify before a South Carolina grand jury (providing the link to Lee Crowe).

At this hearing, counsel for the State agreed with Judge Brett that the unusual legal issue that needed briefing by the parties was whether a specific oral request for other suspects had the same legal effect as a written request. In the context of that question, *i.e.*, oral versus written, the State conceded that a written request of that nature would trigger the case law test applicable to specific requests. (Vol. IV., p. 47). In reviewing that issue, the District Court stated the concerns courts often encounter when dealing with a disputed claim of an oral request, and then obtained a concession from counsel for the State as to the nature of the request *in the case at bar* as follows:

> The Court: But here, you know, the record indicates that there was a specific oral request made, and it's not contended that it wasn't made.
>
> Mr. Nance (for the State): That's correct.

(Vol. IV., p. 48).

The Court then directed the parties to brief the issue of whether an oral request had the same effect as a written one. (Vol. I., p. 199). The Court had already discussed with counsel for Mr. Bowen the different tests involved if there were a specific request as opposed to a general request (or no request). (Vol. IV., pp. 28-31).

SUMMARY OF THE ARGUMENT

I. The Court of Appeals read the entire record in the case, and held that the withheld evidence was material in the constitutional sense. The Court of Appeals held that the withheld evidence created a reasonable doubt that did not otherwise exist, as well as that the withheld evidence might have affected the outcome of the trial. These were the standards applicable at the time of the trial, depending on the existence or nature of a request for exculpatory evidence. Further, the Court of Appeals held that there is a reasonable probability that had the withheld evidence been disclosed to the defense, the result of the proceeding would have been different, and therefore, it was sufficient to undermine confidence in the outcome of the trial.

The holding of the Court of Appeals is correct, and is based on the propositions that the withheld evidence could have been used to impeach key witnesses and casts grave doubt on the guilt of Mr. Bowen.

II. Because the Court of Appeals held that the withheld evidence met both the pre-1985 test for materiality when no defense request is made, and the post-1985 test for materiality where the existence or nature of a defense request is no longer analyzed, the issue of whether there was a specific request is moot.

Furthermore, the Court of Appeals was correct in affirming the finding of fact by the United States District Court that the State had conceded at the federal hearing that a specific oral request was made. The Supreme Court ordinarily does not grant a writ of certiorari to review evidence or specific facts.

Even absent the State's concession, the record from the state hearing on the Motion for New Trial amply supports the federal judge's determination that such a request was made because the trial prosecutor stated such at that hearing.

Finally, none of the reasons for granting a writ of certiorari set out in Rule 17 of the Supreme Court Rules or case law is established by the Petition.

ARGUMENT

RESPONSE TO PROPOSITION I

THIS COURT SHOULD NOT GRANT A WRIT OF CERTIORARI TO REVIEW THE DETERMINATION BY THE COURT OF APPEALS THAT THE INTENTIONALLY WITHHELD EVIDENCE REGARDING THE SUSPECT LEE CROWE IS EXCULPATORY.

Both federal courts below concluded that, under any applicable legal standard, Mr. Bowen had been denied his right to a fair trial because the prosecutorial authorities violated the due process provisions of the United States Constitution by intentionally suppressing exculpatory evidence. They specifically found that the improperly withheld evidence created a reasonable doubt as to Mr. Bowen's guilt that did not otherwise exist, *Bowen v. Maynard, supra,* 799 F.2d at 613, App. 80a;[4] *Bowen v. Brown,* No. 85-1868 (W.D. Okla. January 22, 1986) at App. 39b, 50b,[5] that the improperly withheld evidence

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4. The opinions in the appendices to the Petition for Writ of Certiorari are cited by the appendix and page number as App.____a or App. ____b.

5. Opinion granting Mr. Bowen's Writ of Habeas Corpus. The opinion is at Appendix B to the Petition and will hereafter be cited to that appendix.

might have affected the outcome of the trial, *Bowen v. Maynard, supra,* at 613, App. 80a; *Bowen v. Brown, supra,* at App. 49b, and that had the improperly withheld evidence been disclosed to the defense, there was a reasonable probability (as that term is defined) that the result would have been different. *Bowen v. Maynard, supra,* at 613, App. 80a-81a; *Bowen v. Brown, supra,* at App. 39b, 50b. The United States District Court stated at the hearing on the State's Motion to Stay his order that what the Court had ruled on the withheld exculpatory material "is absolutely elementary. Elementary." Trans. of Hearing, January 23, 1986, at 3.[6]

The State claims that the improperly withheld evidence is not exculpatory because it does not focus on the truth and justice of the finding of guilt, and therefore, is not material. Apparently this is so, in its view, because no witness put Lee Crowe at the scene. The State wholly misunderstands the concept of mistaken eyewitness identification and the defense of alibi. The United States District Court took judicial notice of the frailties of eyewitness identification (Vol. III., p. 48), and the Court of Appeals stated it was not even necessary to do so. *Bowen v. Maynard, supra,* at 613, App. 79a-80a. In *every* case of mistaken identification and alibi, the person the prosecution witnesses place at the scene is the accused, not another person. The State's argument is tautological, *i.e.,* because no one identified Lee Crowe as present at the scene, evidence that Lee Crowe was the real killer cannot be exculpatory. As an evidentiary matter, what the State ignores is that not only could the eyewitnesses have been discredited in their faulty

6. An excerpt of the transcript from that ruling is attached as Appendix B to this Brief in Opposition.

identification, *id.* at 611, App. 69a, but the police investigation itself could have been shown to be seriously flawed. *Id.* at 612-613, App. 72a, 77a-79a.

Moreover, no one identified Mr. Bowen as the shooter, thus the State relied on circumstantial evidence for conviction. It is undisputed that Oklahoma law requires proof that *excludes every reasonable hypothesis* except the guilt of the accused in such cases. *Hager v. State*, 612 P.2d 1369 (Okl. Cr. 1980). Thus, the withheld Lee Crowe material is exculpatory for the independent reason that it provides another hypothesis other than the guilt of Mr. Bowen. Clearly, this explanation is reasonable, and, under the facts, much more so than that Mr. Bowen was the guilty party.

Although this Honorable Court does not ordinarily grant certiorari to review evidence or discuss specific facts, *United States v. Johnston*, 268 U.S. 220, 45 S. Ct. 496, 69 L.Ed. 925 (1925), withheld exculpatory facts support the conclusion of the Court of Appeals. They showed that Lee Crowe:

1. matched the description of the shooter exactly;
2. travelled with the primary victim's ex-wife half-way across the country from South Carolina to Oklahoma days before the shooting;
3. left Oklahoma early in the morning on the same day of the shooting;
4. had a motive, opportunity, and ability to commit the murders;
5. was under investigation for over a year for being a hit man;

6. habitually carried a .45 pistol, a weapon the same caliber as the death weapon;
7. used silver-tipped hollow point bullets, the same unusual type ammunition used in the offense;
8. took unusual steps to disguise his appearance by suddenly shaving his moustache;
9. had been living with the primary victim's ex-wife in South Carolina before, and in Oklahoma at the very time of the murders, during a period when there had been threats by and physical blows between the primary victim and his ex-wife;
10. prior to the trial, had *no* alibi whatsoever for the time of the murders; and
11. to this day has no *confirmed* alibi for the early morning hours when the crimes were committed.

Whereas, on the other hand, Clifford Henry Bowen:

1. wore eye glasses, and could not see without them, although the shooter wore no eye glasses;
2. was in Tyler, Texas, 300 miles away, at the time the witness Chilton claimed she saw him, according to the sworn testimony of a dozen *non-related* independent law-abiding citizens;
3. had no motive to kill any of the victims;
4. had never been convicted of any crime of violence against the person; and
5. had no contact with or relationship with any of the victims or their families.

Furthermore, when the Court of Appeals reviewed the record in its entirety, it discovered that:

1. the witness Mary Chilton had been hypnotized prior to trial;
2. shortly after the killings, Mary Chilton had identified a William Wayne Simmons as the killer;
3. William Wayne Simmons had been arrested and jailed pursuant to a warrant in which the officer swore Ms. Chilton had *positively* identified Mr. Simmons;
4. Mary Chilton had misidentified a police officer in a line-up, at which she recanted her identification of Mr. Simmons;
5. Mary Chilton claimed to have seen Mr. Bowen at the candy machine between 12:15 and 12:30 a.m.;
6. the prosecutor admitted in argument to the jury that Mr. Bowen had been in Tyler until at least 11:30 p.m.;
7. the trial prosecutor explained to the jury the obvious conflict between his witness Chilton and the many citizens who placed Mr. Bowen in Tyler, Texas at that time by claiming that Mr. Bowen flew from Tyler in a private jet airplane and landed at the Downtown Air Park in Oklahoma City;
8. that it was proven without question at the hearing on the first Motion for New Trial that it was scientifically impossible for a jet plane to land at that airstrip on the night in question because the landing strip was far too short, the airport was unlighted, and no control tower existed;

9. that the discovery by appellate counsel for Mr. Bowen two years after trial of the suppressed evidence led to a witness who had told the South Carolina Law Enforcement Division that she overheard Lee Crowe and the primary victim's wife (Patsy Peters) plan the killing in South Carolina about a week before the murders; and

10. that the information about Lee Crowe, attached as the appendix to the opinion from the Court of Appeals, and attached as Appendix A to this Brief in Opposition, was in the State's files since at least August 10, 1980, seven months before trial, and was there at the time defense counsel were first retained.

Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), held that a defendant has a federal constitutional right to information which is favorable to him possessed by the prosecution. In order to establish a violation of *Brady,* a defendant must show that the information was material either on the issue of guilt or the issue of punishment. *Id.* A subsequent decision, *United States v. Agurs,* 427 U.S. 97, 96 S. Ct. 2392, 49 L.Ed.2d 342 (1976), held that if the defendant makes only a general request, or no request at all, he must show that the undisclosed information created a reasonable doubt that did not otherwise exist. This standard of materiality was applied to the instant case by the Oklahoma appellate court, and by the United States District Court and the United States Court of Appeals.

United States v. Agurs, supra, also held that if the defendant makes a specific request, he need only show that the undisclosed evidence might have affected the out-

come of the trial. This standard of materiality was also applied to the instant case by the United States District Court and the United States Court of Appeals.

This was the law governing the prosecutor's duty at the time of Mr. Bowen's trial. As has been emphasized, Judge Brett held as a matter of fact and of law that the withheld evidence met both of these standards, and required reversal. *Bowen v. Brown, supra,* at App. 39b, 45b, 49b-50b. The Court of Appeals held likewise. *Bowen v. Maynard, supra,* at 613, App. 79a-81a.

Subsequent to the instant case becoming final in the state courts, this Honorable Court decided *United States v. Bagley,* ____U.S.____, 105 S. Ct. 3375, 87 L.Ed.2d 481 (1985). In *Bagley,* it was held that "a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." *Id.,* 105 S. Ct. at 3381.

The United States Court of Appeals in the case at bar ruled that the issue as to whether *United States v. Bagley, supra,* is retroactive is moot, since it found that the more stringent pre-*Bagley* standard of "creates a reasonable doubt that otherwise did not exist" was met by the facts in this case. *Bowen v. Maynard, supra,* at 603, 613, App. 37a-38a, 80a.

However, should this Honorable Court consider *Bagley* to be applicable to the instant case, its less stringent standard of materiality clearly is met here, and it does away with the previously required analysis of the nature or existence of a request. The Court of Appeals and the United States District Court, both of which read and studied the *record in its entirety,* as required, held that

there was a reasonable probability (as that term is defined) that had the withheld evidence been disclosed to the defense, the result would have been different. *Bowen v. Maynard, supra,* at 613, App. 80a-81a; *Bowen v. Brown, supra,* at App. 39b, 50b.

In view of the sworn testimony of the dozen alibi witnesses placing Clifford Henry Bowen 300 miles from the crime scene, and the total lack of police investigation prior to trial to confirm *Lee Crowe's* alibi, the jurors, or one of them, might have had a doubt about Mr. Bowen's guilt because of, among other things, the lack of thoroughness of the police methods employed in assembling the case against him. In addition to the issue of Crowe's whereabouts, one could query—why wasn't Patsy Peters, the victim's ex-wife, interviewed? Why wasn't the information about the hit-man investigation pursued? Why wasn't Lee Crowe placed in the line-up? Would Deanna Burris, the woman present when Crowe and Patsy Peters planned the killing, have been discovered by an interview with and investigation by South Carolina authorities? The list could go on to illustrate that a misidentification of Mr. Bowen had occurred, and an innocent man was on trial.

Contrary to the State's position, the Court of Appeals did not reject the legal principles in *Moore v. Illinois,* 408 U.S. 786, 92 S. Ct. 2562, 33 L.Ed.2d 706 (1972). Instead the Court of Appeals clearly discussed and distinguished the facts of that case from the facts of the instant case. *Bowen v. Maynard, supra,* at 611-612, App. 69a-71a, 74a-76a.

Proposition I states no reason to grant a writ of certiorari in this case.

RESPONSE TO PROPOSITION TWO

THIS HONORABLE COURT SHOULD NOT GRANT A WRIT OF CERTIORARI TO REVIEW THE DETERMINATION BY THE COURT OF APPEALS THAT THE FEDERAL DISTRICT COURT COMPORTED WITH THE REQUIREMENTS OF 28 U.S.C. § 2254(d) AND WAS CORRECT IN FINDING AS FACT THAT THERE HAD BEEN A SPECIFIC REQUEST BY THE DEFENSE FOR EXCULPATORY EVIDENCE.

The State complains that the suppression of the evidence regarding Lee Crowe, even if exculpatory, should not result in reversal of the convictions because it claims it did not concede that a specific oral request was made by the defense for other suspects. This argument fails to support the grant of certiorari for two reasons: 1) it is moot and 2) the habeas fact finder, the United States District Court, found that there was such a request made, and the United States Court of Appeals affirmed that finding of fact based on the hearings in federal and state court.

First, the existence of a specific request for exculpatory evidence is not pertinent to review of the opinion of the Court of Appeals, because the Court below held that the intentionally withheld evidence met the *Agurs* standard applicable when *no* request was made. *Bowen v. Maynard, supra,* at 613, App. 80a. Further, in applying the current standard set out in *United States v. Bagley, supra,* the Court of Appeals held that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Bowen v. Maynard, supra,* at 613, App. 80a-81a.

This affirmed the ruling by the United States District Court. Both courts reached the conclusion that, since both the strictest test under *Agurs* and the new test under *Bagley* had been met, the retroactivity of *Bagley* is moot.

Second, the finding of fact by the United States District Court that the State conceded such a request was made is supported by the record of the federal evidentiary hearing, and the State's proposed Findings of Fact and Conclusions of Law therein, and the Court of Appeals so held. *Id.* at 607, App. 50a-53a. It is well established that the United States Supreme Court ordinarily will not grant certiorari to review the evidence or discuss specific facts. *United States v. Johnston, supra.* Furthermore, the Court of Appeals correctly held that the United States District Court complied with the requirements of *Sumner v. Mata,* 449 U.S. 539, 101 S. Ct. 764, 66 L.Ed.2d 722 (1981), *Bowen v. Maynard, supra,* at 609, App. 62a.

It should be noted, however, that the record in the *state* court amply supports the federal judge's conclusion that a request was made, whether or not a concession was made in the federal hearing. The trial prosecutor stated to the trial judge on the Motion for New Trial that the trial defense counsel was not ineffective because, "He was conferring with opposing counsel. They obtained a complete access to our files. He, as he indicated to me when I asked him, *he discussed the possibility of various suspects in the thing.* He did a good job checking into it before trial." (Tr. 973). (emphasis added).

This statement alone would support the federal judge's finding that any factual determination by the state court

to the contrary would be erroneous. 28 U.S.C. § 2254 (d)(8).

Proposition II states no reason to grant a writ of certiorari in this case.

CONCLUSION

The Petitioner has failed to demonstrate that any of the reasons to grant a writ of certiorari set out in Rule 17 of the Supreme Court Rules or case law exist in the instant case.

The State claims in its petition that the federal courts in this case have converted *Brady-Agurs,* into "a license to set aside fairly won convictions because information about a discarded suspect might have helped the defense, even though it in no way indicates the defendant is not guilty." The conviction of an innocent man on mistaken identification by strangers, while the State had in its files much stronger evidence against the probable real killer, cannot be claimed to be a "fairly won conviction." It is a damning indictment of the balance of the prosecutors in the Tenth Circuit for the State of Oklahoma to claim that "countless convictions" are now subject to *Brady* attack. Counsel for the Respondent sincerely hope, as officers of the Court and as former prosecutors, that other prosecutors have not placed countless other persons in the penitentiary, including Death Row, under circumstances as shocking as these.

The Court of Appeals held that the Constitution of the United States had been violated.

The Court was right.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ZIMMERMANN & LAVINE, P.C.

By: _____

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Attorneys for Respondent,
Clifford Henry Bowen
(On Appeal Only)

CERTIFICATE OF SERVICE

I hereby certify that I have on this the _____ day of October 1986 served a true and correct copy of the foregoing Brief in Opposition to Petition for Certiorari by mailing same by Certified Mail, Return Receipt Requested to:

Michael C. Turpen
Attorney General of Oklahoma
112 State Capitol Building
Oklahoma City, Oklahoma 73105

APPENDIX A

OKLAHOMA CITY POLICE DEPARTMENT
SUPPLEMENTAL/MISCELLANEOUS REPORT

Crime Incident:
FOLLOW UP REF: TRIPLE HOMICIDE

Location of Event:
5200 N. Classen Guest House Motel

Time of Event:
7-6-80

Reporting Officer:
B. Horn

Unit # 638

Comm # 0214

Report Time:
8-10-80 1:30 p.m.

Typist:
gayer 8-10-80 10:30 pm

SUSPECT:
CROW, LEONARD LEE WM/39
Hanahan, South Carolina

WITNESS:

#1 Sheriff Ron Goff
Madill, OK

#2 MAE MARGRAVES WF.50

#3 FORGUSON, JIMMY WM/33

#4 PETERS, AKA: FORGUSON, PATSY WM/25

#5 JAMES CALDWELL
South Carolina Law Inforcement Agency

#6 M. DEAN POWELL
South Carolina Law Inforcement Agency

#7 Sgt. McIntosh, Ervin
Ervin Texas Police Department

#8 Chief Conroy
Charleston, South Carolina Chief of Police.

BODY OF REPORT:

On 7-22-80 Det. B. Horn and B. Cook went to Madill Oklahoma to interview next to kin and attempt to obtain information on possible suspects in reference to triple homicide occurring at the Guest House Motel. Upon arriving in Madill Oklahoma, these Detectives interviewed Sheriff Ron Goff, who knows the victim RAYMOND PETERS.

Upon speaking to Sheriff Goff he recalls that RAYMOND PETERS ex-wife PATSY PETERS, was in the Madill area prior and during the death of her ex-husband RAYMOND PETERS. He also recalls a subject being with PATSY PETERS he described as 6′2″, 225#, having salt and pepper hair. It should be noted that this subject matches the physical description of the suspect in the triple homicide.

Sheriff Goff advised that PATSY PETERS parents this being Mr. & Mrs. FORGUSON, live in Manville Oklahoma which is just north of Madill Oklahoma. He advised that Mr. FORGUSON is a farmer and had lived at this residence all of his life. He also advised that when PATSY was younger she had met RAYMOND PETERS,

who was much older that she was and that RAYMOND PETERS never actually married but transported her to South Carolina, where she became a prostitute.

These Detectives then went to MAE MARGRAVES residence, this being the mother of victim RAYMOND PETERS. Upon interviewing Mrs. MARGRAVES she advised that RAYMOND had lived in Madill most of his life and was an associate of JENO HINES. She also advised that RAYMOND had been married twice, his first wife being DIXIE PETERS, who still lives in Madili Oklahoma and his second wife was PATSY PETERS, who know resides in South Carolina. She recalls a phone conversation which was made from RAY to PATSY approx. a week or two weeks before RAY's death. During the phone conversation she recalls RAY telling PATSY not to come to Oklahoma City, because he did not want to see her. RAYMOND told PATSY that he just wanted to see his two children. RAYMOND threaten PATSY and advised her if she came to OKLAHOMA CITY to see him that he would contact PATSY's parents Mr. & Mrs. FORGUSON and tell them what she really was. RAYMOND then hanged up on PATSY, when Patsy arrived in OKC with the two children PATSY came to Mrs. MARGRAVES residence.

Upon coming to her residence she recalls a subject with PATSY, she described the subject as being a white male in his late 40's approx. 6'2", 225#, having salt and pepper hair and wearing some type of cap. She recalls that this subject did not say anything to anyone he just followed PATSY into the house with the two kids. Mrs. MARGRAVES though it was strange that PATSY talked to everyone but never identifiy the person who was with her. Mrs. MARGRAVES advised that the subject was at

her residence a few days before RAYMOND was killed. Det. Cook advised that he interviewed RAYMOND PETERS oldest son and during the conversation with the son, he was advised that RAYMOND had slapped PATSY while standing outside the house. He also advised that the subject that was with PATSY was not present during this time. These Detectives also interviewed DIXIE PETERS while at Mrs. MARGRAVES residence.

DIXIE PETERS stated that she had not seen RAYMOND PETERS for approx. 6 or 7 years, the interview of DIXIE PETERS was then terminated at this point. MAY MARGRAVES advised that PATSY's parents lived in Manville, Okla. just north of Madill, Okla. MS. MARGRAVES gave the directions on how to get to the FERGUSON'S Residence. These Detectives then proceeded to Manville, Okla. Upon arrival first talked to the son of MS. FERGUSON, this being JIMMY FERGUSON, who lived in a house directly across the highway, MR. & MRS. FERGUSON. Upon interviewing JIMMY FERGUSON he advised that the subject with PATSY PETERS was her fiance LEE CROW, he advised that LEE CROW is a Chief of Police in South Carolina. JIM advised us to contact MRS. FERGUSON, this being his mother who lives across the street and talk to her because she has PATSY's new address and could give us more information in ref. to LEE CROW.

These Detectives then went across the street where officers met MRS. FERGUSON, MRS. FERGUSON advised that PATSY was engaged to a LEE CROW who is Chief of Police in Hanahan, So. Carolina. She further advised that PATSY had learned about the death of RAYMOND PETERS when MAY MARGRAVES had con-

tacted her early Sunday morning, 7-6-80. MRS. FERGUSON advised that she was at OKC at a religious convention 7-6-80 and her daughter PATSY along with LEE CROW and her husband were at Madill, Okla. MRS. FERGUSON advised that PATSY had two three year old children. She further advised that the children were at her residence now and that they are taking care of the children because PATSY and LEE CROW had gone back to So. Carolina early Sunday morning 7-6-80. She advised that LEE CROW was quitting his job in So. Carolina and was going to move to Okla. LEE had applied for a police job in Irving, Texas. They had gone back to pack their belongings to move back to their residence until he could locate a job. MRS. FERGUSON has never liked RAYMOND PETERS because of the way he had treated PATSY when they were married.

While talking to MRS. FERGUSON it appeared that she was extremely nervous and uncomfortable. She gave us a phone number and address so that we could contact PATSY in So. Carolina.

These Detectives then proceeded back to OKC and contacted Irving, Texas P.D. and spoke to Sgt. McINTOSH of the TRAINING division. Upon speaking to Sgt. McINTOSH he advised that LEONARD LEE CROW did apply as a police officer in Irving, Texas. He further advised that they have a photograph of LEONARD LEE CROW. LEE CROW was not accepted as an applicant because of his inability to pass the physical agility test. Sgt. McINTOSH advised that he would give us a copy of the photograph upon our request.

Upon contacting Charlston, So. Carolina these Detectives spoke to Chief Conroy of Charleston and he advised

that LEONARD LEE CROW had been employed in the Sheriff's Dept. in Charleston but had been fired a few years ago, however, he is now employed in Hanahan, So. Carolina, this being a suburb of Charleston. LEE CROW is a Lt. in the Hanahan P.D. Upon advising Chief Conroy of the circumstances involved in the Homicide and also the suspicious nature of the event occurring around PATSY PETERS and her departure from Madill after the Homicide Chief Conroy advised that he had further information that he would give us, however, he first wanted to contact two So. Carolina agents and he would call us back at a later time and fill us in in ref. to LEONARD LEE CROW.

This Detective later received a phone call from JAMES CALDWELL and DEAN POWELL. They advised that they were law enforcement agents from So. Carolina and they wished to speak to me in ref. to CROWE. We were advised that LEONARD LEE CROWE was requested to leave the Hanahan P.D. or he would be fired because of his involvement with known prostitutes and felons. MR. POWELL advised that they had been investigating LEE CROWE for the past year on suspicion of being a hit man. He advised that on several occasions LEE CROWE would leave the state and upon returning they later discovered that where ever he had been had been a HOmicide. Upon advising MR. POWELL that the weapon that was used in the Homicide was a .45 Colt MR. POWELL advised that RAY PETERS carried a .45 automatic with him where ever he goes and he also uses silver tip hollow ammunition. It should be noted that this is the same type of ammunition that was used in the triple homicide. Upon advising POWELL of information we received from HAROLD BEARINGS (CR) BEHRENS in ref. to a sub-

ject who is an associate of RAYMOND PETERS, known only as RICK. We asked POWELL if he had a homicide approx. one and a half year ago where a subject by the name of RICK was abducted from a 7-11 store and taken out, put into a car, and body was never recovered. MR. POWELL advised that they did have a incident which occured in which a RICKY SEGRAVES had been abducted at gun point from a convenience store by two subjects. He advised that this subject was never found. The main suspects in ref. to the disappearance of RICKY SEGRAVES was DANIEL HOGG and another unknown W/M, physical description 6'3", 250#'s. Powell advised that it was suspicioned that RICKY, who is a distributor for dialoted had been holding money back from his connections and they contracted to kill RICKY SEGRAVES. MR. POWELL stated that LEE CROWE has an extremely high temper and that he believes that LEE is capable of killing anyone for money. He recalled an incident where LEE CROWE's ex-girlfriend had a boyfriend who kept bothering her and they had found the boyfriend later with five bullet holes in his head. The weapon that was used was a small caliber pistol and upon contacting LEE CROWE and asking him where his pistol was at he advised he had lost it. MR. POWELL advised that he would attempt to locate photographs and prints of LEE CROWE and send them to our dept. He further advised that he would come to OKC and bring further information. It also should be noted that when LEE CROWE left So. Carolina he had a mustache and upon returning to So. Carolina the mustache was shaved off.

These Detectives then went to Irving, Texas where we obtained a photograph of LEONARD LEE CROWE. A

photo lineup was shown to witness and the witnesses did not identify LEE CROWE. Also a fingerprint card was obtained and comparison made with negative results. DEAN POWELL obtained several shell casings from LEE CROWE when he has practiced on the pistol range and has sent these shell casings to our dept. known comparison with the shell casing to the shell casing which was recovered at the crime scene. Officer Golightly advised that they did not match up.

DISPOSITION AND SUMMARY:

After reviewing the above information the suspect LEONARD LEE CROWE has been eliminated as a suspect, however, So. Carolina advised that they will continue their investigation and if further information is obtained they will contact our police dept. For further information in ref. to LEONARD LEE CROWE see the follow up reports made by Det. Bill Harrison, Det. Bill Cook.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-85-1868-BT

CLIFFORD HENRY BOWEN,
Prisoner #113852,
Petitioner,

v.

JOHN N. BROWN, WARDEN
OKLAHOMA STATE PENITENTIARY,
Respondent.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
HAD ON JANUARY 23, 1986

EXCERPT—COURT'S RULING ON
MOTION TO STAY

BEFORE THE HONORABLE THOMAS R. BRETT,
Judge.

APPEARANCES:

For the Petitioner:

MR. JACK B. ZIMMERMANN
MR. JIM E. LAVINE
Five Post Oak Park
Suite 1130
Houston, Texas 77027

For the Respondent:

MR. ROBERT A. NANCE
MR. ROBERT W. COLE
Office of the Attorney General
State Capitol
Oklahoma City, Oklahoma 73105

Beebe Caslavka
UNITED STATES COURT REPORTER

* * *

[p. 3]

findings of fact and conclusions of law clearly point out that the exculpatory material in the file of the State should have been disclosed under the United States Supreme Court opinions of *Brady, Agurs* and *Bagley* and the standards set forth therein.

The Court's opinion clearly states—contrary to the comment of counsel, that is respondent's counsel—that had the information been properly disclosed to the defendant and in turn relevant portions thereof introduced in evidence, a reasonable doubt and different result most probably would have occurred in the conviction of the petitioner in this matter.

It is the Court's view on that subject that the record indicates in this case and what the Court has done on that subject is absolutely elementary. Elementary. For that reason the Court does not think there is a likelihood that the respondents will prevail on appeal.

Concerning the irreparable harm to the State, which is criterion number two in the *Battle* case, the State the Court does not think will suffer any irreparable harm in this matter if the Court for purposes of appeal herein requires an appropriate appearance bond to be posted or filed by the petitioner, and I will address that in a moment.

Concerning criterion number three, that a stay will not irreparably harm the petitioner, in the words of the

* * *